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Supreme Court, U.S.
FILED

No. 08-571

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In The
Supreme Court of the United States

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ELKO COUNTY, NEVADA,

Petitioners,

v.

THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS; UNITED STATES OF AMERICA; and JOHN C. CARPENTER, individually and as agent for Citizens United for the South Canyon Road,

Respondents.

◆

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

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PETITION FOR WRIT OF CERTIORARI

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GARY D. WOODBURY
Elko County District Attorney
1515 7th Street
Elko, NV 89801
(775) 738-3101

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is a proposed intervenor of right required to have independent Article III and prudential standing to intervene as a defendant aligned with the United States in a quiet title action under 28 U.S.C. § 2409?
2. Is an environmental interest sufficient to confer Article III and prudential standing on a proposed intervenor in a Quiet Title action under 28 U.S.C. § 2409?
3. Is a circuit court of appeals required to decide whether a case in district court is moot as between the original parties before it decides whether a proposed intervenor of right needs Article III and prudential standing to support intervention?

PARTIES TO THE PROCEEDING

Plaintiff-counter-defendant-Appellee below:

UNITED STATES OF AMERICA

Represented by Elizabeth Ann Peterson, Esq., AUSA,
Post Office Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026

Defendants below:

JOHN C. CARPENTER, INDIVIDUALLY AND AS AGENT OF CITIZENS FOR THE SOUTH CANYON ROAD, GRANT GERBER and Q. JOHNSON O.

Represented Pro Se

Defendant-Appellee below:

COUNTY OF ELKO

Represented by Kristin McQueary, Esq.
Elko County District Attorney's Office
1515 7th Street
Elko, NV 89801

Defendants-Intervenors-Appellants below:

THE WILDERNESS SOCIETY and GREAT OLD BROADS FOR WILDERNESS

Represented by Michael S. Freeman, Esq.
EarthJustice
1400 Glenarm Place, Suite 300
Denver, CO 80202

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CITATION TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

(i) *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008);

(ii) September 19, 2006 Order of the Federal District Court;

(iii) June 13, 2003 Order of the Federal District Court;

(iv) *United States v. Carpenter*, 298 F.3d 1122 (9th Cir. 2002);

(v) August 1, 2008 Order;

(vi) September 16, 2008 Mandate of the Ninth Circuit.

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STATEMENT OF JURISDICTION

(i) The opinion of the Ninth Circuit Court of Appeals from which review is sought was filed on May 25, 2008.

(ii) Rehearing was denied August 1, 2008. No order granting an extension of time to file a petition for a writ of certiorari exists.

(iii) Mandate of the Ninth Circuit was filed effective September 16. 2008.

(iv) Basis for Federal Jurisdiction. 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. § 1345 (United States as plaintiff).

(v) Statutory provision conferring jurisdiction on the Supreme Court: 28 U.S.C. § 1254.

(vi) Rule 29.4(b) or (c) notifications are not required.

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STATUTES INVOLVED

28 U.S.C. § 2409

Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title [28 U.S.C. §§ 1346, 1347, 1491, or 2410], sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954 [1986], as amended (26 U.S.C. §§ 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. § 666). . . .

Federal Rule of Civil Procedure 24. Intervention

(a) Intervention of Right.

(1) On timely motion, the court must permit anyone to intervene who:

> (A) is given an unconditional right to intervene by a federal statute; or
>
> (B) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. . . .

Section 8 of the Act of July 26, 1866, 14 Stat. 253, and later codified at 43 U.S.C. § 932.[3]

A right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

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STATEMENT OF THE CASE

This case involves a dispute over ownership of a road easement for the South Canyon Road located in Elko County, Nevada, in the Humboldt-Toiyabe National Forest and near the boundary of the Jarbidge Wilderness.

In October 1999, the United States filed suit alleging trespass and seeking an injunction against several Elko County individuals involved in reconstructing the road which had washed out in 1995. Pursuant to FRCP 21, the Federal District Court sua sponte named Elko County as a defendant to the lawsuit and simultaneously referred the case to mediation.

Elko County filed an answer and counterclaim, which alleged Elko County had title to an easement for the South Canyon Road under the auspices of Section 8 of the Act of July 26, 1866, 14 Stat. 253, formerly section 2477 of the Revised Statutes (hereinafter R.S. 2477) of the United States, and requested the District Court quiet title to the easement against the United States.

On March 2, 2001, all parties reached settlement on all issues. On March 30, 2001, the Wilderness Society and the Great Old Broads for Wilderness (hereafter TWS) filed a motion to intervene as a matter of right as a defendant to Elko County's counterclaim. The District Court denied the motion as untimely. TWS appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit, even though the District Court had conducted no analysis of the other intervention criteria under FRCP 24(a)(2) except timeliness, reversed the District Court decision and remanded the case with instructions to the District Court to grant the motion to intervene and conduct further proceedings consistent with its opinion, *United States v. Carpenter*, 298 F.3d 1122, 1125-26 (9th Cir. 2002).

TWS, after remand, modified its intervention motion to include cross-claims against the United States under the Administrative Procedure Act. TWS alleged that in agreeing not to contest whether Elko County owned an R.S. 2477 easement in the South Canyon, the United States effectively granted an easement without complying with Federal law.

On remand on June 13, 2003, the District Court held that because the Ninth Circuit instructed it to grant the motion to intervene before a complete FRCP 24(a)(2) analysis had been done, it was necessary for the Court to determine if TWS had Article III and Prudential standing. The District Court found that TWS demonstrated constitutional and prudential standing as to the cross-claims but the cross-claims should be dismissed because the Department of Justice's decision to settle the case was not an agency action reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The District Court held that TWS had neither constitutional nor prudential standing to intervene as a defendant against Elko County's counterclaim under the Quiet Title Act and again denied intervention.

In that same order, the District Court stayed the effectiveness of the Settlement Agreement because it was concerned that the United States had granted a right-of-way triggering procedural requirements not met by the agreement. The District Court stayed the agreement pending compliance with procedural requirements.

On April 27, 2005, and May 31, 2005, the United States Forest Service completed an analysis under the National Environmental Policy Act (NEPA) concerning re-establishment of the road. The Forest Service decided to re-establish a primitive four-wheel drive road in the South Canyon. TWS requested judicial review of that administrative decision in a separate suit. That suit is still pending. *The Wilderness Society; Great Old Broads for Wilderness v. United States Forest Service, et al.*, USDC 3:07-CV-00170.

Beginning April 30, 2006, the United States and Elko County presented evidence to the District Court for a week to resolve the District Court's questions whether 1) the settlement agreement granted a right-of-way that required procedures not provided for in the settlement agreement and 2) whether there was sufficient evidence that Elko County had a colorable claim to an R.S. 2477 easement in South Canyon to justify the United States not contesting it. TWS was present as amicus and participated in post-hearing briefing. On September 19, 2006, the District Court held that the Settlement Agreement was fair, adequate, reasonable and in accord with applicable law and lifted the stay.

TWS appealed to the Ninth Circuit from both the June 13, 2003, District Court order denying intervention in the Quiet Title Act and dismissal of its cross-claims and from the September 19, 2006, final order of the District Court approving the Settlement agreement.

On May 20, 2008, the Ninth Circuit reversed the order denying intervention and remanded the case for further proceedings, *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008).

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ARGUMENT

WHY CERTIORARI SHOULD BE GRANTED

Permitting environmental groups, or anyone else without a claim of ownership to the real property in issue, to intervene as of right as a Defendant aligned with the United States in a quiet title action under 28 U.S.C. § 2409 effectively allows the intervenor, as well as the Courts, to improperly inject themselves into general executive branch discretionary policy decisions.

This Court has repeatedly forbidden the federal courts and parties from litigating general federal policy questions in cases in which the United States is participating. That is typically done by finding that prospective plaintiffs lack either Article III or Prudential standing or by confining the courts to non policy holdings, *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980). Intervention rules, however, lacking any prudential standing concepts and being so broadly interpreted in favor of intervention, result in intervenors not similarly screened. While intervenors must, theoretically, take a lawsuit as they find it, in practice, and the instant case is a good example, interference by the intervenors with discretionary federal policy is at the forefront of the issues before the trial court.

There is no specific, identifiable federal law providing TWS an environment free of motor vehicles outside the boundaries of a wilderness, just as there is no specific identifiable law entitling taxpayers to have Government funds expended in any particular way. Environmental interests exist as a result of, and are protected by, citizen suit provisions of specific environmental statutes, or by the Administrative Procedure Act. Where only title to real property is at stake, as it is in a quiet title action, and not the use to which the land will ultimately be put, the general rule – that a proposed intervenor need only have a significant protectable interest in the subject matter of the law suit, protected by some statute or law, results in intervenors being allowed to challenge or promote general federal policy before the court in quiet title actions. Thus, the federal courts become, as this Court held they should not, general complaint bureaus about that policy. See *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

Allowing an environmental group to intervene as a co-defendant with the government in a NEPA action has been prohibited by the Ninth Circuit, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002). The rationale for that rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA. Allowing intervention on the side of the United States as plaintiff in a condemnation action by the United States, a kind of inverse circumstance from a quiet title action, is objectionable for essentially the same reason, *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986). Allowing intervention by an environmental group as a defendant with the United States in a quiet title action interjects the court and the intervenors into the discretion of the executive in a virtually identical way. There is no required administrative procedure for the Department of Justice to follow in deciding how and to what degree to initiate a quiet title action. Whether and how to defend a quiet title action is wholly within the discretion of the executive branch, 28 U.S.C. §§ 516, 519.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483 (1982) this Court held that:

> Assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.

The Circuit Courts of Appeal are divided on whether Article III standing is necessary to support intervention in the district courts in every case, *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). Most recently, the Tenth Circuit decided in *San Juan County v. United States*, 503 F.3d 1163, 1171 (2007), where environmental groups, without a claim of title, sought intervention as defendants in a quiet title action, that so long as the party on whose side intervention is sought has Article III standing, the intervenor need not independently establish his own standing.

The Ninth Circuit's position on the necessity of establishing independent Article III standing to support intervention of right pursuant to FRCP 24(a) is ambiguous, *Portland Audubon Society v. Hodel*, 866 F.2d 302, 308, n.1 (9th Cir. 1989).

> The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. See *Cook v. Boorstin*, 246 U.S. App. D.C. 201, 763 F.2d 1462, 1470-71 (D.C. Cir. 1985). However, we in the past have resolved intervention questions without making reference to standing doctrine. See, e.g., *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n.21, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986) (observing that "the Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing"). Without an en banc review, we must follow the Sagebrush Rebellion analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test. *However, the standing requirement is at least implicitly addressed by our requirement that the applicant must*

> *"assert an interest relating to the property or transaction which is the subject of the action." County of Orange*, 799 F.2d at 537 (quoting *Stringfellow*, 783 F.2d at 826). (Emphasis added).

Contrasting *Portland Audubon Society* with *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980), it is clear that the Ninth Circuit doesn't even remotely analyze an injury in fact for standing purposes in the same way it analyzes a protectable interest for intervention purposes.

> The 'interest test' is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

There is, as well, significant discord among the Circuit Courts regarding the nature of the protectable interest required by FRCP 24 to support intervention. The Tenth Circuit Court of Appeals in *San Juan County v. United States*, 503 F.3d 1163, commencing at page 1188, spent approximately 15 pages of its opinion analyzing and comparing the varying position of the Circuit Courts regarding the nature of the interest required by FRCP 24(a)(2). The specific issue there, as here, was the right of an environmental group to intervene as a defendant in a quiet title action. The net result of that decision was very similar to that determined by the Ninth Circuit in *County* *of Fresno*; it is not the nature of an aspiring intervenor's interest, rather it is the practical effect of the litigation on the aspiring intervenor which limits the right to intervene.

The Seventh Circuit in *United States v. 36.96 Acres of Land*, 754 F.2d 855, 476 U.S. 1108 (1986) requires the protectable legal interest to be direct, but neither the Tenth Circuit, nor the Ninth Circuit appear to impose a similar requirement, or if they do, "direct" lacks any reasonably defined meaning. In *San Juan County,* commencing at page 1193, the Tenth circuit stated that:

> Whether an interest is direct or indirect could be a matter of metaphysical debate because almost any causal connection can be represented as a chain of causation in which intermediate steps separate the initial act from the impact on the prospective intervenor.

The Tenth Circuit has also held that requiring a direct interest of an intervenor is a "too narrow" construction of Rule 24(a)(2), *Natural Res. Def. Council v. U.S.*, 578 F.3d 1341, 1344 (10th Cir. 1978).

The focus of those two circuits is on "practical harm" and the adequacy of representation as the limiting concepts. There is nothing in those two components that has ever been used to prevent prospective intervenors from joining litigation where their only interest is in promoting or opposing a particular federal policy.

The First Circuit does not find "direct" to be a metaphysical concept, *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984).

Prudential standing concepts are not required for intervention. This Court has held that application of the prudential standing rules is necessary, at least in part, to insure that the scope of the judiciary's power does not impinge on the rights and responsibilities of the executive and legislative branches of government, *Valley Forge Christian College v. Americans United for Separation*, 454 U.S. 464, 474 (1982).

In theory an intervenor is limited to the proceedings and issues as they stand at the time intervention is granted; and in theory, he is not permitted to enlarge those issues or alter the nature of the proceeding. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944). What is not prevented however, is the actual result in this case. The United States, for its own reasons, does not want to litigate any further whether Elko County has a valid R.S. 2477 easement in the South Canyon, but the intervening environmental groups do. This case was settled by the parties in 2001 slightly over two years after it began. Solely because of the intervention efforts of TWS, the case is now into its ninth year of litigation.

1. ARTICLE III STANDING

The Federal District Court in this case held on June 13, 2003, that proposed intervenor TWS had to have Article III and Prudential Standing to intervene of right as a Defendant in Elko County's counterclaim seeking to quiet title to a road easement. The District Court conducted the standing analysis only because the Ninth Circuit directed the District Court to allow TWS to intervene in the quiet title counterclaim prior to the District Court completing its FRCP 24(a) intervention analysis, and not as a result of any requirement in the Ninth Circuit that standing is required to intervene as of right.

The Ninth Circuit panel in May, 2008, held that if TWS needed Article III standing to intervene, it had it by virtue of its interest in the environment:

> To the extent that the United States is arguing that intervenor-appellants lack any interest in the quiet title action, we believe that position is foreclosed by our prior opinion, in which we held that the intervenors were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members. This interest was sufficient to allow them to intervene under Federal Rule of Civil Procedure 24(a) and to satisfy any requirements of Article III standing.

The Ninth Circuit was required to conduct a de novo review of a denial of a motion to intervene, *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), but no standing analysis by the Court of Appeals beyond that quoted above was ever conducted. Because the

Ninth Circuit's decision prevented the District Court from conducting a full analysis of FRCP 24 criteria to intervene, no analysis of intervention criteria was conducted, including the usual presumption that the government is adequately protecting the legal interests of its citizens. See *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,* 674 F.2d 970, 973 (3d Cir. 1982).

FRCP 24 requires four criteria to be met before intervention will be granted as of right under FRCP 24(a)(2). First, the application must be timely. Second, the intervenor must show an interest relating to the property or transaction which is the subject of the action. Third, the intervenor must show that the disposition of the suit may as a practical matter impair or impede the intervenor's ability to protect that interest. And, fourth, the intervenor must show that the interest is not adequately represented by existing parties, FRCP 24, *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir. 1985).

The interest of the proposed intervenor must be a significant, legally protectable one, *Donaldson v. United States*, 400 U.S. 517, 531 (1971). A prospective intervenor need not establish that his asserted interest is one that is protected by the statute under which the litigation is brought, rather only that it is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue, *Sierra Club v. United States EPA*, 995 F.2d 1478 (9th Cir. 1993).

The Ninth Circuit claims to be guided in determining whether intervention of right is appropriate, "primarily by practical and equitable considerations." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Intervention rules are interpreted in favor of intervention.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court held that a plaintiff's standing required (1) that an injury in fact be demonstrated that is concrete, distinct, palpable, and actual or imminent; (2) that a causal connection exists between the injury and the conduct complained of be established that is fairly traceable to the challenged action of the defendant; and (3) that there is a substantial likelihood that the requested relief will remedy the alleged injury in fact. If the plaintiff filing the lawsuit does not meet the *Lujan* criteria, there is no case or controversy and the Federal Courts are without jurisdiction to address the merits of the case. The injury in fact must be an invasion of a legally protected interest, *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993).

Inherent in the Article III analysis of plaintiff's standing in *Lujan* is the corollary proposition that the named defendant must be the person or entity causing an injury that is fairly traceable to him. If the plaintiff names the wrong defendant, although the case might be dismissed through a variety of procedures, it is fundamental that there can be no Article III case or controversy. TWS clearly has not done, nor could it do, any injury to Elko County that is remediable in a quiet title action.

This Court has held that a change in use of real property that effects the environment is an injury in fact sufficient to lay the basis for standing under the Administrative Procedure Act, *Sierra Club v. Morton*, 405 U.S. 727 (1971) at page 734.

> The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

But in *Bennett v. Spear*, 520 U.S. 154, 163 (1997), this Court warned that what suffices for an injury in fact under the Administrative Procedure Act might be less than what is required for other purposes.

The expansive "injury in fact" language in *Sierra Club v. Morton* is virtually identical in substance to the language of the Ninth Circuit in this case, but this case is a quiet title action, not an APA action.

Imposing Article III standing requirements in place of intervention's protectable interest requirement is a reasonable procedural means to prevent those without a title interest from improperly intervening in quiet title actions. Alternatively, as a practical matter, it does not matter whether standing is required for FRCP 24 intervention as held in *Southern Christian Leadership Conference v. Kelley*, 241 U.S. App. D.C. 340, 747 F.2d 777 (D.C. Cir. 1984) or a showing of a greater interest is required for intervention than for standing as held in *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1984), so long as there is also required to be shown a direct causal connection between the conduct complained of that is fairly traceable to the challenged action of the Defendant.

2. PRUDENTIAL STANDING

The Ninth Circuit panel opinion of May 2008 did not address prudential standing. Without prudential limitations, the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions, *Warth v. Seldin*, 422 U.S. at 499-500 (1975). Under the rules of prudential standing, the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim, *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979).

Among prudential considerations, the plaintiff's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970). There does not seem to be any reason why a proposed intervenor on behalf of a defendant, regardless of whether Article III standing is otherwise required, should not be required to demonstrate that their interests fall within the zone of interests protected by the law upon which the suit is premised. Absent such a requirement, as in this case, an intervenor may join litigation for no reason other than to promote or denigrate executive discretionary policy.

Indeed, if this Court were not inclined to require Article III standing for intervenors in quiet title actions, requiring a prudential standing interest alone would substantially assist the lower courts in defining significant protectable legal interests required by FRCP 24(a).

That Congress can and does modify prudential standing requirements is clear, *Bennett v. Spear*, 520 U.S. 154, 162 (1997). This Court held that Congress legislates against a background of this Court's prudential standing doctrine. *Id.* at 163. Congress has conferred both Article III and Prudential standing to a broad range of potential plaintiffs through the Administrative Procedure Act, Section 10(a), as well as the citizen suit provisions of some environmental and other statues, 33 U.S.C. § 1365(g) (Clean Water Act), 30 U.S.C. § 1270(a) (Surface Mining Control and Reclamation Act), 15 U.S.C. § 797(b)(5) (Energy Supply and Environmental Coordination Act); 42 U.S.C. § 9124(a) (Ocean Thermal Energy Conversion Act), 7 U.S.C. § 2305(c), 15 U.S.C. § 72.

Presumably, Congress also legislates against a background of this Court's intervention decisions, and would be aware that certiorari was denied by this Court to review the Seventh Circuit decision in *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1986), a condemnation case denying intervention based on environmental concerns.

Congress has not made any effort whatsoever to alter 28 U.S.C. § 2409, or any related statutes, in a way that suggests it wants environmental concerns litigated in quiet title actions.

Allowing TWS to intervene as of right in this case without meeting Article III and/or prudential standing requirements in an action under the Quiet Title Act, 28 U.S.C. § 2409, which statute this court has described as being the exclusive procedure by which a claimant can judicially challenge the title of the

United States to real property, *Block v. North Dakota*, 461 U.S. 273 (1983), is fundamentally at odds with the general principals set forth above.

3. MOOTNESS

Even if this Court finds that it is not generally necessary for TWS to establish Article III and Prudential Standing to intervene in a quiet title action as a defendant, the fact that the case was moot at the time TWS moved for intervention, or became moot when the United States Forest Service independently decided to open a road to motorized traffic in the South Canyon regardless of the outcome of the quiet title counterclaim, required TWS to establish standing, *Tosco Corp. v. Hodel*, 804 F.2d 590 (10th Cir. 1984).

An actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed, *Preiser v. Newkirk*, 422 U.S. 395 (1975); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). The requisite personal interest that must exist at the commencement of litigation must continue throughout its existence, *Arizonans* at page 67.

There is no division among the Circuit Courts that one seeking to intervene in an otherwise moot case in which all parties have settled all issues, must have standing. *Tosco Corp. et al. v. Hodel*, 804 F.2d 590 (10th Cir. 1984); and *Bay Area Nuclear Waste Coalition v. Lujan*, 42 F.3d 1398 (9th Cir. 1994) must have Article III standing; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Roe v. Wade*, 410 U.S. 113 (1973); *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972); *United States v. Munsingwear*, 340 U.S. 36 (1950); *Yniquez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, *Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 U.S. 8, 4 Dall. 8, 11, 1 L. Ed. 718 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). Federal Courts are, as a consequence, required to examine jurisdiction before they proceed to the merits of the case, *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

On March 2, 2001, the original parties reached an agreement as to all issues in the case. TWS did not seek to intervene until March 30, 2001. No justiciable controversy exists when the question sought to be adjudicated has been mooted by subsequent developments, *California v. San Pablo & Tulare R. Co.*, 149 U.S. 308 (1893); *Massachusetts v. EPA*, 549 U.S. 497 (2007). A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome, *Powell v. McCormack*, 395 U.S. 486, 496 (1969). A settlement agreement resolving all facets of the dispute between the parties moots the case, *Gator. Com v. L.L. Bean, Inc.*, 398 F.3d 1125, 1131 (2005).

The District Court approved the Settlement Agreement on Sept. 19, 2006. Even if the earlier decision of the District Court staying the effectiveness of the agreement kept the case or controversy alive, that changed on Sept. 19, 2006, when the stay was lifted.

Additionally, the District Court in its June 13, 2003, order clearly stated that TWS' only interest in the litigation was that if Elko County prevailed a road open to motorized traffic would exist, and that if the United States prevailed, no such road would exist.

The Ninth Circuit acknowledged in its opinion, 526 F.3d at page 1242, that the United States Forest Service's independently determined decision to repair the road might well create a mootness issue:

> We are aware that other events have taken place that may bear on the proceedings in this case. The intervenor-appellants have filed an independent action in District Court to challenge the Forest Service's decision to open a road to vehicular traffic and we are also aware that the construction of the road has begun. We express no opinion on the

> merits of this independent action or whether, on remand, any party may successfully contend that the matter has become moot.

The Ninth Circuit was required to decide mootness, not leave it for another day. An appellate court is under a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it, or make no contention concerning it, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

It is particularly important in this case that mootness be decided if this Court determines that Article III standing is not generally necessary to intervene in an action under the Quiet Title Act. If the decision of the Ninth Circuit is allowed to stand as is, that Article III standing exists solely as a consequence of TWS' interest in preserving a wilderness without a specific statutory predicate, or any other analysis, it is precedent for the proposition that Article III standing has no Prudential standing component which is exactly contrary to this Court's prudential standing decisions, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-562 (1992).

◆

CONCLUSION

Unless all the requirements of standing – Article III and Prudential – are imposed on prospective intervenors in quiet title actions where the only issue is who has title to a piece of property, both Article III and Prudential requirements are emasculated and are meaningless.

DATED: October 28, 2008

Respectfully submitted,

GARY D. WOODBURY, ESQ.
Elko County District Attorney
Attorneys for Petitioner,
Elko County

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-counter-defendant-Appellee.* v. JOHN C. CARPENTER; GRANT GERBER; Q. JOHNSON O., *Defendants,* and COUNTY OF ELKO, *Defendant-Appellee,* THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS, *Defendants-Intervenors-Appellants.*	No. 06-15596 D.C. No. CV-99-00547-RLH/RAM OPINION

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Argued and Submitted
February 27, 2008 – Pasadena, California

Filed May 20, 2008

Before: Mary M. Schroeder, Dorothy W. Nelson and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Elizabeth Ann Peterson, AUSA, Washington, DC, for plaintiff-counter-defendant-appellee United States of America.

Kristin McQueary, Elko, Nevada, for defendant-appellee County of Elko.

Michael S. Freeman, Denver, Colorado, for defendants-intervenors-appellants The Wilderness Society et al.

OPINION

SCHROEDER, Circuit Judge:

This is a dispute over the status of a road on U.S. Forest Service land in Elko County, Nevada. The case was before us for the first time in 2002. *See United States v. Carpenter,* 298 F.3d 1122 (9th Cir. 2002). At that time, the intervenor-appellant environmental groups wanted to object to the terms of a proposed settlement between the United States and Elko County that effectively allowed the County to repair the road. We ordered the district court to grant the motion to intervene. *Id.* at 1125.

The intervenor-appellants are now back, claiming that the district court disregarded our mandate by not permitting them to intervene in the Quiet Title Act portion of the suit that was the subject of the proposed settlement and therefore was the critical part of the litigation. The district court, after our decision, permitted the intervenor-appellants to appear only as amici during the settlement approval proceedings; it denied their motion to participate in an evidentiary hearing. After the hearing, the court ruled against their position on the merits without, in appellants' view, permitting them adequate participation. The intervenor-appellants now want us not only to vacate the approval so that they can fully present their position, but they also want us to reach the merits and rule in their favor.

For their part, the United States and the County defend the settlement, contending that the intervenors' participation was adequate because the district court properly, in appellees' view, ruled that the intervenors lacked standing to participate as a party in the quiet title proceedings in light of their lack of any property interest in the disputed right of way for the road. Resolution of the appeal therefore requires some understanding of the procedural history of the case both before the first appeal and after our prior opinion.

I. Background

We begin with the initiation of the lawsuit in 1999 by the United States against residents of Elko County who were using self-help measures to restore one of the old logging roads near a wilderness area. *Carpenter*, 298 F.3d at 1124. The residents were known as the "Shovel Brigade." The United States at that time was concerned about the degradation of the environment through the adverse effect the Shovel Brigade was having on bull trout in the river adjacent to the roadway, and the threat to maintaining the pristine nature of that area. Because the road leads to the Jarbidge Wilderness Area, the restoration of the roadway would have increased traffic into the wilderness preserve. The U.S. Attorney General filed this suit alleging two causes of action: unlawful take of threatened bull trout in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G), and common law trespass.

The district court added Elko County as a party defendant, and it filed a counterclaim under the Quiet Title Act, 28 U.S.C. § 2409a, alleging that title to an easement for the roadway should be quieted in the County as opposed to the United States. The district court ordered the parties to mediation. As we stated in our prior opinion, when the district court sent the United States and the County to mediation, the parties agreed that the discussions would be confidential. *Carpenter*, 298 F.3d at 1124. The negotiations were protracted but agreement was eventually reached:

> The parties returned to court after months of unsuccessful negotiations, and the district court ordered further confidential settlement proceedings, this time before a Magistrate Judge. On March 2, 2001, the parties notified the court that they had reached a tentative agreement, and the court lifted the

> confidentiality order covering the mediation proceedings so that the agreement could be publicly disseminated. The United States agreed that it would not contest that Elko County had a right of way to the road, but did not waive its authority to manage federal lands and natural resources in accordance with federal environmental laws. The defendants agreed that they would not do any work on the road without receiving prior approval from the Forest Service and that they would comply with federal environmental laws.

Id. It was at that point, after the settlement had been proposed and the intervenor environmentalists became aware of the terms of the settlement, that they sought to intervene. *Id.* at 1125.

The district court originally denied intervention, principally on the ground that the application was not timely. *Id.* at 1124. We reversed the denial of intervention, holding that the application was timely in the circumstances, and that the intervenors met the requirements for intervention because their interests at that point were no longer being represented by any party to the proceeding. We ordered the court to grant the intervention. *Id.* at 1125-26.

That was six years ago. After we remanded the case to the district court, the appellants renewed their motion to intervene and attempted to file cross-claims against the United States pursuant to the Administrative Procedure Act ("APA"), directly challenging the terms of the settlement agreement as violative of the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4332, the Federal Land Protection and Management Act ("FLPMA"), 42 U.S.C. § 1701 *et seq.*, and Forest Service regulations, 36 C.F.R. pt. 251. The district court denied intervention in the Quiet Title Act claim, stating in its order that appellants have "neither constitutional nor prudential standing to contest Elko County's easement claim." It did, however, permit the appellants to intervene to assert their cross-claims against the United States but dismissed those cross-claims on the ground that the Attorney General's decision to settle litigation is not reviewable under the APA. Nevertheless, the district court judge then assigned to the case, Judge Hagen, stayed the settlement approval proceeding until the United States demonstrated that it complied with the FLPMA, NEPA, and Forest Service regulations.

When Judge Hagen retired, Judge Hunt took over the case, and lifted the stay. He agreed with the previous Judge's orders denying intervention, but disagreed with the order requiring compliance with the various environmental laws. The court held hearings on the merits of the settlement, but did not permit the appellants to present evidence or participate as parties. It then approved the settlement and the appellants filed this appeal. They contend that the district court failed to follow our prior mandate when it denied them full participation in the settlement approval proceedings, and that the district court erred in dismissing their cross-claims attacking the terms of the settlement.

II. Analysis

We turn first to whether the district court failed to follow the law of the case in denying intervenor-appellants full participation in the settlement proceedings. The appellants contend that our mandate required such participation, while the appellees contend that we did not decide in the prior opinion that appellants were entitled to participate in the Quiet Title Act action, and that the district court was correct in denying them participation as parties in that claim because of their lack of a property interest in the subject matter of the dispute, i.e., the right-of-way for the road. Everyone agrees that the interest of the intervenor-appellants is the use and enjoyment of the unique aesthetic environment of this wilderness area and that they have no property interest.

[1] We look first to the scope of our prior mandate. In the earlier appeal we clearly, and without equivocation, ordered the district court to permit intervention in the case. *Carpenter*, 298 F.3d at 1125-26. The case included the Quiet Title Act claim. Indeed, it was apparent that the controversial settlement could not be discussed outside the context of the Quiet Title Act claim. At that time, that was all the case was about. We ordered intervention without requiring intervenors to assert a property interest in the easement.

[2] To the extent that the United States is arguing that intervenor-appellants lack any interest in the quiet title action, we believe that position is foreclosed by our prior opinion, in which we held that the intervenors were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members. This interest was sufficient to allow them to intervene under Federal Rule of Civil Procedure 24(a) and to satisfy any requirements of Article III standing.

Our prior decision is in accord with the only other circuit case to deal with intervention in a Quiet Title Act action, the recent Tenth Circuit decision in *San Juan County v. United States,* 503 F.3d 1163 (10th Cir. 2007). There the Tenth Circuit held that a conservation group did not need to claim a property interest in a road in order to intervene in a quiet title action. *Id.* at 1200. Instead, the group's interest in the environmental impact of vehicular traffic on the road satisfied the condition of Rule 24(a)(2) that an intervenor claim "an interest relating to the property or transaction which is the subject of the action." *Id.* at 1201.

[3] Although our prior opinion foreclosed any argument that appellants were not entitled to intervene, we did not suggest that the appellants' approval of the settlement was required. We recognize that the intervenors whose claims are not the subject of a settlement cannot veto that settlement. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478

U.S. 501, 529 (1986) ("[W]hile an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent."). The district court was clearly concerned that the intervenor, whose interests were limited to use and enjoyment of the land, asserted no property interest in the right of way at issue. This concern does not warrant the exclusion of the intervenors from participating as parties in ongoing proceedings, including settlement review proceedings. It does mean, however, that intervenors' consent is not required for approval of the settlement between the parties asserting property interests.

[4] Because the intervenors were not permitted to participate in the settlement review proceedings, the approval of the settlement must be vacated. The district court should not take any new action on the settlement before considering the contentions of the intervenors as well as the other parties.

The district court held that it lacked jurisdiction over appellants' cross-claims under the APA, 5 U.S.C. § 702, because the Attorney General's decision to enter into the settlement agreement was not an "agency action" subject to judicial review under the APA. To the extent that the district court meant that decisions of the Attorney General are never reviewable because they do not result from notice-and-comment decisionmaking, that conclusion was plainly incorrect. "Final actions of the Attorney General fall within the definition of agency action reviewable under the APA." *Banzhaf v. Smith,* 737 F.2d 1167, 1168 (D.C. Cir. 1984) (en banc) (per curiam); *see also Morris v. Gressette,* 432 U.S. 491, 500-01 (1977) (characterizing the Attorney General's decision not to file an objection under the Voting Rights Act as an agency action, but holding that Congress intended such action to be nonreviewable); *Proietti v. Levi,* 530 F.2d 836, 838 (9th Cir. 1976) (holding that the Attorney General's decision whether to certify that the federal employee defendant was acting within the scope of his employment under the Federal Drivers Act was a judicially reviewable agency action under the APA).

On appeal, the United States does not contend that the decision to enter the settlement agreement was not an "agency action." Instead, it interprets the district court's holding to mean that the Attorney General's decision to settle a case constitutes an action that is "committed to agency discretion by law" and is therefore unreviewable pursuant to 5 U.S.C. § 701(a)(2). *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971) (holding that the "committed to agency discretion by law" exception to reviewability arises when there is "no law to apply" to the agency action). Such a holding would be contrary to federal law.

[5] While it is true that the Attorney General has plenary discretion under 28 U.S.C. §§ 516 and 519 to settle litigation to which the federal government is a party, *see United States v. Hercules, Inc.,*

961 F.2d 796, 798 (8th Cir. 1992); *see also United States v. Am. Prod. Indus., Inc.,* 58 F.3d 404, 407 (9th Cir. 1995), a decision that is discretionary is not rendered unreviewable in all circumstances. Rather, "[w]here an action is committed to absolute agency discretion by law, . . . courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." *Guadamuz v. Bowen,* 859 F.2d 762, 767 (9th Cir. 1988); *see also Ness Inv. Corp. v. U.S. Dep't of Agric.,* 512 F.2d 706, 714 (9th Cir. 1975) (holding that discretionary agency actions are reviewable where the claim alleges "that an agency . . . abused its discretion by exceeding its legal authority or by failing to comply with its own regulations").

[6] The appellants' cross-claims allege that the United States granted the County a property interest in public land without complying with the procedural mechanisms for relinquishing title or issuing rights-of-way set forth in the FLPMA. Put differently, the appellants argue not that the Attorney General exercised his discretion poorly but that he settled the lawsuit in a manner that he was not legally authorized to do – in other words, that he "exceeded [his] legal authority." *Guadamuz,* 859 F.2d at 767. Therefore, under *Ness* and *Guadamuz,* the appellants' cross-claims are reviewable, and the district court erred in concluding otherwise.

[7] Our conclusion is in line with a decision of the Fourth Circuit in a similar context. Relying on this Court's opinion in *Guadamuz,* the Fourth Circuit held, in *Executive Business Media, Inc. v. U.S. Department of Defense,* 3 F.3d 759, 761 (4th Cir. 1993), that the Attorney General's decision to settle a contract case was judicially reviewable where the claim alleged that the settlement "fail[ed] to comply with competitive bidding procedures." Acknowledging the Attorney General's plenary power over litigation to which the federal government is a party, the Fourth Circuit nevertheless explained that "plenary power means absolute authority to pursue legitimate objectives and does not include license to agree to settlement terms that would violate the civil laws governing the agency." *Id.* at 762. We find the Fourth Circuit's reasoning persuasive in this case. We agree with its statement that, "[w]e think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality." *Id.* at 762. We adopt the reasoning of the Fourth Circuit in *Executive Business.*

[8] Here, the appellants' cross-claims allege that the Attorney General circumvented federal law by entering into the settlement agreement with Elko County. Because this Court's precedent makes clear that such claims are reviewable under the APA, we reverse the district court's dismissal of the appellants' cross-claims and remand for consideration on the merits.

The appellants would like to short circuit the district court proceedings and have us decide the merits of their position with respect to the settlement. It would not be appropriate, however, for us to reach the merits of their position until it is fully legally and factually developed in a record before the district court. This is what the district court's denial at intervention prevented.

We are aware that other events have taken place that may bear on the proceedings in this case. The intervenor-appellants have filed an independent action in district court to challenge the Forest Service's decision to open a road to vehicular traffic and we are also aware that the construction of the road has begun. We express no opinion on the merits of this independent action or whether, on remand, any party may successfully contend that the matter has become moot.

Accordingly, pursuant to our earlier mandate, we hold that the district court must permit the intervenors to participate as parties in advocating their position in the Quiet Title Act action. We must vacate the settlement approval to effectuate that result. We also hold that the intervenors' cross-claims are reviewable under the APA.

The approval of the settlement of the Quiet Title Act claim is vacated, as is the district court's order denying the appellants' motion to intervene. The district court's dismissal of the appellants' cross-claims is reversed. The case is remanded for further proceedings consistent with this opinion.

VACATED in part, **REVERSED** in part, and **REMANDED**.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES
OF AMERICA,
Plaintiff,
vs.
JOHN C. CARPENTER,
individually and as agent
for CITIZENS UNITED
FOR THE SOUTH
CANYON ROAD; O.Q.
JOHNSON, individually;
and ELKO COUNTY,
NEVADA
Defendants.
THE WILDERNESS
SOCIETY and GREAT
OLD BROADS FOR
WILDERNESS,
Intervenors and
Cross-claimants.

3:99-cv-00547-RLH-RAM

DECISION

Before the Court is the issue of whether a proposed settlement agreement between the United States of America and the Defendants is fundamentally fair, adequate, reasonable, and conforms to applicable law. The resolution of that issue involves a consideration of whether the statute of limitations was violated and, if so, under the circumstances, divests this Court of jurisdiction, and whether there is a colorable claim for an R.S. 2477 Right of Way. The foregoing sub-issues need not be ultimately decided. The Court need only determine whether there could be sufficient substance to the Defendants' claims to justify the United States entering into an agreement to settle the controversy to avoid the possibility of an adverse decision. If the Court finds the United States has the authority to enter into such a settlement agreement, and that the agreement is fair, adequate, and reasonable, the Court can then determine whether the stay should be lifted and the parties permitted to implement the settlement agreement.

The history of the area in question and the procedural history will be discussed below, but it is important to note that in pursuit of its duty to resolve this lawsuit, this Court ordered and conducted a week-long evidentiary hearing from April 3 through April 10, 2006, in Reno, Nevada. At the conclusion of that hearing the Court established a briefing schedule which produced the following, which have been considered by this Court: On June 27, 2006, Defendant Elko County filed its Brief of Elko County in Support of Settlement Agreement (#284). On June 30, 2006, the United States' Opening Post-Hearing Brief (#287) was filed. On the same day, The Wilderness Society and Great Broads for Wilderness (hereafter "TWS") filed their Amicus Curiae Points and Authorities in Opposition to Lifting Stay of Settlement

Agreement (#286) and an Appendix in Support of Amicus Curiae Points and Authorities (#285).[1]

Thereafter was filed the Reply Brief of Elko County in Support of Settlement Agreement (#288, filed August 7, 2006), the Response Points and Authorities of the Wilderness Society and Great Old Broads for Wilderness in Opposition to Lifting Stay of Settlement Agreement (#289, filed August 7, 2006), and the United States' Responsive Post-Hearing Brief (#291, also filed August 7, 2006).

All the foregoing have been reviewed and studied by the Court. Having done so, the Court determined that no further hearing or briefing was necessary and it now issues this written decision.

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[1] The Appendix of TWS was objected to by Elko County (#292) on the grounds that it contains no relevant historical information that is different from what was presented at the hearing, and that TWS has, in violation of the procedural directives of the Court, attempted to supplement the evidentiary record in a way that affords the other parties no opportunity to answer any new allegations. It was also objected to by the United States, in its Responsive Post-Hearing Brief (#291) because it was not authorized and further because there is no foundation provided for the context of the documents, that it claims to characterize a proposed settlement that was not adopted, and which TWS claims never to have seen, and falsely accuses the United States of not providing a copy when the United States was never asked to do so. While the Court finds the objections have merit, the Court has reviewed the documents. It also finds they are of little relevance and, in fact, provide some support for the position of the other parties, which the Court will note later.

BACKGROUND

The events which spawned this lawsuit, as well as the procedural history of this lawsuit, are long and tortured and the Court will attempt to avoid becoming mired in an effort to rehearse every detail. The area involved is called Jarbidge, Nevada, and lies in scenic rugged mountains in northeastern Nevada. The town of Jarbidge is presently a relatively small community situated in the bottom of a deep and narrow canyon through which runs the Jarbidge River (sometimes called the West Fork of the Jarbidge River). The headwaters of the Jarbidge River is in the south end of the canyon, called, appropriately, the South Canyon. From thence the river runs north, fed by a number of creeks, to its confluence with the East Fork of the Jarbidge River, and ultimately empties into the West Fork of the Bruneau River in Idaho, which in turn empties into the Snake River.

Along the river there runs a road which extends into the South Canyon. The ownership of the right-of-way for that road and the right and responsibility for its maintenance, together with the potential threat to the bull trout which inhabit the river, form the genesis of the present dispute.

The maintenance of the road has been haphazard at best and, at times, non-existent. But in the late 1990s, after flooding made the road impassable, public clamor from local citizens to improve the road reached an excited pitch. A group, which became referred to as the "Shovel Brigade" threatened to open the road themselves if local government officials failed to act. In October 6, 1999, the United States filed this action to enjoin John C. Carpenter and others from conducting unauthorized activities on the South Jarbidge Canyon Road. The Complaint alleged that the group's proposal to reopen the road constituted a trespass and violated the Endangered Species Act ("ESA"). The District Court temporarily restrained the individual defendants from taking action on the road, then dissolved that restraining order, stayed the litigation, joined Elko County as a Defendant, and ordered the parties to mediate the dispute. Elko County asserted a counterclaim under the Quiet Title Act ("QTA"), alleging that the South Canyon road is an R.S. 2477 right-of-way, 43 U.S.C. §932 (repealed, see Publ. L. (4-579 (October 21, 1976)).[2] Elko County claimed that the right-of-way existed before this area was reserved by inclusion into the National Forest System. The critical date for that inclusion appears to be accepted by all parties as 1909. The United states filed an Amended Complaint against Elko County, alleging claims for unauthorized activities on National Forest System lands and violation of the Clean Water Act. 33 U.S.C. §1311(a).

After several months of mediation, the parties publicly released a proposed settlement agreement in June 2000, but Elko County rejected that proposal on

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[2] Prior to its repeal, R.S. 2477 provided: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

November 8, 2000, and the parties resumed negotiations before the United States Magistrate Judge. The parties acknowledged their final agreement after a court hearing (conducted by Magistrate Judge Robert McQuaid) on March 2, 2001. The compromised claims included the United States' claim for trespass and Clean Water Act violations stemming from the actions taken by Elko County in 1998 and Elko County's quiet title counterclaim for an R.S. 2477 right-of-way on the South Canyon road. The Agreement was entered as an order by the Court on April 24, 2001 (#118).

On March 20, 2001, the Wilderness Society and the Great Old Broads for Wilderness (collectively referred to as "TWS") moved to intervene as a matter of right as a counter-defendant to Elko County's counterclaim (#106). The Court denied the Motion to Intervene as untimely (#123). TWS appealed. On August 12, 2002, the Ninth Circuit Court of Appeals found that the motion to intervene was timely and reversed (#131). On December 17, 2002, TWS served a motion to vacate settlement and a proposed answer to counterclaim and cross-claims (##141, 142). In these pleadings, TWS challenged only the provision of the Agreement under which the United States agreed not to contest Elko County's assertion that it owned an R.S. 2477 right-of-way for the South Canyon Road.

On February 4, 2003, TWS served a revised proposed answer to counterclaim and amended cross-claims (#151). The United States moved to dismiss the cross-claims. Elko County moved to deny intervention or dismiss the TWS cross-claims. For the first time, in its Reply to those motions, TWS provided the Court with some authority allegedly supporting its motion to vacate.

By Order (#165) of June 13, 2003, this Court resolved the post-appeal motions, which included granting intervention by TWS, but only as to the cross-claims against the United States, which cross-claims the Court dismissed, finding the Department of Justice's decision to settle the case was not an "agency action" reviewable under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The Court then considered the Agreement itself to determine whether the settlement was "fundamentally fair, adequate and reasonable and conformed to applicable law."

At that time, the Court was troubled by the language of the Agreement in which the United States agreed "not to contest that Elko County has an R.S. 2477 Right of Way" over the South Canyon Road, finding that it appeared that the agreement not to contest the right-of-way constituted a disclaimer of interest under subsection (c) of the Quiet Title Act. *See* 28 U.S.C. § 2409a(e). It appeared, with the limited evidence before it, that the disclaimer was tantamount to the issuance of a right-of-way, triggering certain procedural requirements which had not been met by the Agreement. Accordingly the Court stayed the effectiveness of the Settlement Agreement pending compliance with the procedural requirements.

On November 14, 2003, the United States moved for reconsideration to clarify the June 13, 2003 Order (#173). The Court declined to lift the stay, finding that, on the information presented, the clause still constituted an impermissible grant of an easement to Elko County, noting that the parties had not "developed" sufficient facts to convince the Court that Elko County had an R.S. 2477 right-of-way or that the QTA statute of limitations had not expired before Elko County's counterclaim was filed. The Court continued the stay and ordered the parties to choose between two options. Ultimately, Elko County refused to proceed with either of the two options, choosing either a legislative solution or litigation to resolve the issue. The United States did not object to a further stay or to either option the Court had offered, elected to proceed and, meanwhile, notified the parties (#188) as follows:

> Between now and December 18, 2004, however, the United States intends to modify the proposed action that is being analyzed under the National Environmental Policy Act ("NEPA") TO INCLUDE AN OPTION FOR THE United States to grant an easement to Elko County under the applicable authority. The environmental analysis needed under either the Settlement Agreement or under a grant of an easement by the USFS is virtually identical. By modifying the proposed action, the United States anticipates that it will be able to complete the environmental analysis needed to issue a decision regarding

> the grant of an easement to Elko County before December 18, 2004. The United States believes that USFS's decision on that proposal may have some effect on Elko County's decision whether to accept that option, in lieu of litigation.

The Forest Service modified the scope of the environmental analysis it had begun and completed the environmental review and decision-making. Its final decisions were issued on April 27, 2005 and May 31, 2005. Both decisions resulted from the Agreement. The April 27, 2005, decision addressed the South Jarbidge Canyon and access. The decision indicates that a primitive, four-wheel-drive road will be maintained in the South Canyon from the Pavlak Grade to the Urdahl crossing. The decision does not indicate who will perform the work needed to carry out the decision. The intervenors and some individuals appealed the Forest Service's decision, but the decision was affirmed. Any further litigation will require a separate suit in federal court.

The second decision addressed the North Jarbidge Canyon, from Pavlak Grade through the town of Jarbidge and to the Idaho border, and called for significant changes that will benefit the environment. It also called for the replacement of a number of bridges to improve water flow, safety and fish passage, and authorized certain watershed improvements which Elko County agreed to implement. That decision was never appealed, and is final, but has marginal relevance to the issues presently before the

Court. Also, Elko County and the United States filed a stipulation to partially lift the stay on the Agreement to allow two bridges on that road to be replaced. There was no objection by TWS and the bridges have now been replaced, with Elko County contributing $150,000 in this effort in accordance with its obligations under the Agreement.

On June 30, 2005, the parties submitted status reports. On August 1, 2005, Elko County filed an "Offer of Proof" asserting that serious questions of fact and law existed regarding its R.S. 2477 counterclaim and those questions provided a sufficient basis to approve the Agreement. Following a status conference on August 3, 2005, at the Court's suggestion, Elko County submitted a motion for an evidentiary hearing. That motion was granted and the hearing was set to begin April 3, 2006, in Reno, Nevada, to address the issues of the validity of the R.S. 2477 right-of-way or easement, and whether the statute of limitations had been violated, and, if so, whether the violation divested this Court of jurisdiction to consider the matter.

THE SETTLEMENT AGREEMENT

The Settlement Agreement in question resolves all pending claims involving Elko County and one individual defendant, John C. Carpenter (collectively referred to as "Elko County") (#118). The compromised claims included the United States' claims for trespass and Clean Water Act violations stemming from the actions taken by Elko County in 1998, and Elko County's Quiet Title Act ("QTA") counterclaim for an R.S. 2477 right-of-way on the South Canyon Road. The Settlement Agreement encompassed and resolved the parties' disputes over environmental and ownership issues with respect to nearly 15 miles of roads in Jarbidge Canyon.

In the Settlement Agreement, the United States agreed to not "contest that Elko County has an R.S. 2477 right of way on the South Canyon Road" and specifically retained its management authority over federally owned lands, pursuant to numerous statutes, including the Endangered Species Act ("ESA"),[3] 16 U.S.C. § 1531, *et seq.,* National Forest Management Act ("NFMA"), 16 U.S.C. §4321, *et seq.,* and the Clean Water Act ("CWA"), 33 U.S.C. §1251, *et seq.*

Elko County agreed to obtain appropriate authorization from the Forest Service before doing any work on the South Canyon Road from Pine Creek Campground to the Snowslide Gulch Trailhead. If Elko County planned to reestablish portions of the South Canyon Road, it was required to submit a proposal for Forest Service approval. The United States specifically indicated that it could not authorize road reconstruction without first analyzing the proposal under NEPA and determining whether the proposal complies with applicable federal laws. Elko County agreed not to challenge any determination by the United States to analyze a proposal under NEPA or other federal laws.

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[3] It is not made clear, but the Court gathers that the bull trout in the Jarbidge River have not yet been added to the Endangered Species list, but it is feared that harmful activity in the area provides a threat that they may become so.

Elko County also agreed to contribute $50,000 to complete watershed projects that will benefit the Jarbidge area watershed and agreed to perform $150,000 worth of work on the road leading north from Jarbidge into Idaho to reduce impacts to the Jarbidge River. Further, the parties agreed to meet on a regular basis to discuss road and trial maintenance and repair. Elko County also agreed that it would not use self-help measures to resolve future road disputes but would, instead, use legal processes.

As noted above, after the Settlement Agreement was filed and initially approved by the Court, the parties began to implement it. Much has already been accomplished toward that end.

DISCUSSION

In reaching its decision herein, the Court is aware that it has made previous determinations, assessments and presumptions. It is argued in some quarters that it cannot now change its prior declarations or decisions, but is bound by its previous determinations. The Court reminds the parties and all others, that prior rulings were admittedly based upon a paucity of actual evidence and an abundance of representations. In fact, the Court has previously acknowledged that it lacked sufficient information and evidence to make certain determinations. Contrary to the contentions of some, the Court has not determined that the Settlement Agreement was invalid. Rather, it raised issues of its legality and the propriety of its implementation. Thus it *stayed* its implementation. It did not abrogate it. It has from the beginning encouraged the parties to find a reasonable and proper solution to this dispute, one which would protect the legitimate interests of all the parties. Elko County and the United States have labored long and diligently to that end.

The determination of whether the Settlement Agreement is fair, adequate, and reasonable does not require the Court to decide whether Elko County has an R.S. 2477 right-of-way, or whether they violated the statute of limitations. What the Court needed to determine was whether there was sufficient evidence on both sides of those issues that a jury, or other fact finder, could find sufficient evidence to justify a verdict for either party. Said another way, could a verdict for the United States or a verdict for Elko County be justified by the evidence presented.

This Court finds there is sufficient evidence to sustain a ruling for either, making the outcome of this litigation sufficiently uncertain as to justify the parties' entering into a Settlement Agreement to resolve the matter to avoid the possibility of an adverse judgment.

This Court, upon consideration of the evidence presented and the legal arguments and authorities presented, finds that the Settlement Agreement is fundamentally fair, adequate, reasonable, and conforms to applicable law, and that the stay should be lifted and the Settlement Agreement implemented.

I. THE GOVERNMENT'S AUTHORITY TO SETTLE THE CASE

The United States Department of Justice's authority to settle this case is clear, and does not violate any law or regulation, TWS's protestations notwithstanding. Furthermore, this Court's prior rulings, finding or suggesting otherwise, were erroneous and based upon a misunderstanding of the law, and inadequate evidence.

In *Swift & Co. V. United States,* 276 U.S. 311, 316-17 (1928), an intervenor in an antitrust case challenged a consent decree entered between the United States and several meat packers. The intervenor claimed the Department of Justice acted outside the parameters of the applicable law (the Sherman Act). The Supreme Court rejected the argument, finding no such limitation on the exercise of the Attorney General's discretion in resolving the case, even noting that "His authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Id.*

Subsequent courts have relied on *Swift,* and on 28 U.S.C. §§ 517 and 519 (which authorize the Attorney

General to conduct litigation on behalf of the United States), to approve settlements negotiated by the DOJ, even when they include more or less relief than the DOJ could have received in a court judgment. In an Eighth Circuit case involving the settlement of a CERCLA cost-recovery claim, a waste generator company appealed a consent decree on the argument that the decree was outside the DOJ's authority. The Eighth Circuit rejected the argument, citing *Swift*, stating that "the statutory authority of the Attorney General to control litigation is not diminished without a clear and unambiguous directive from Congress." *United States v. Hercules, Inc.*, 961 F.2d 796, 798-799 (8th Cir. 1992), *citing United States v. International Union of Operating Eng'rs,* 638 F.2d 1161, 1162 (9th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980). The Eighth Circuit held that CERCLA was not a "clear and unambiguous express" of congressional intent to limit the DOJ's ability to settle claims.

The Attorney General is empowered to conduct all litigation on behalf of the United States, its agencies and its officers unless otherwise provided by law. *See* 28 U.S.C. § 510, 515-519. Under Section 510 Congress granted the Attorney General the authority to promulgate regulations delegating litigation responsibilities. The Attorney General has issued such regulations and directives that permit various Department of Justice officials to compromise claims, which have been acknowledged and upheld by the Ninth Circuit and other courts. *See United States v.*

American Production Industries, Inc., 58 F.3d 404, 407 (9th Cir. 1995); *United States v. Hercules, Inc., supra; Swift & Co. V. United States, supra*; and *United States v. Walcott,* 972 F.2d 323, 327 F.2d 323, 327 (11th Cir. 1992).

With respect to litigation involving interests in land, the Attorney General has delegated his litigation authority to the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice. *See* 28 C.F.R. §0.65(1)(2). The Attorney General has also delegated the authority to compromise and close civil claims to the various Assistant Attorneys General. *See* C.F.R. §§ 0.160-0.162, 0.164. Assistant Attorneys General have the authority to further delegate settlement authority to United States Attorneys. *See* 28 C.F.R. § 0.168. TWS's purported authorities to the contrary are distinguishable.

The Settlement Agreement *does not grant an interest in land* to Elko County. The DOJ agrees only to forebear claiming in the future that Elko County has no such right-of-way. It is a promise not to take legal action to enforce a specific law. It merely acknowledges disputed claims about the existence of an R.S. 2477, and compromises those claims by agreeing not to contest them further. *See Heckler v. Chaney,* 470 U.S. 821, 832-33 (1985) (agency's decision not to take enforcement action is committed to its discretion and is unreviewable, unless Congress explicitly limits its discretion). Congress has not established any explicit limitations here.

Contrary to the arguments of TWS, the United States' claim for trespass fails if Elko County has a right-of-way on the contested property. It is not trespass if the party has a right to be there. Thus, the Government is obtaining a *quid pro quo* in its compromise of the various claims. It, like Elko County, avoids the possibility of an adverse ruling which would eliminate any control or authority over the maintenance of the road or the threat to the river and the fish. By the settlement agreement it retains control and obtains financial and other assistance in the implementation of its plans and obligations to protect the environment.

II. THE STATUTE OF LIMITATIONS ISSUE

First, the Court acknowledges that its prior assertion, that this might be a dispositive jurisdictional issue, was in error. The jurisdictional basis for this lawsuit is well established by the Complaint, Amended Complaint, and the fact that the United States is a party to the litigation. Furthermore, while a violation of the statute of limitations might preclude Elko County from obtaining a judgment to quiet its title to the right-of-way, that would not extinguish its claim (and defense) that it has a right-of-way. While the title may not be quieted, if it was found that such a right-of-way existed, the United States' underlying claim of trespass would fail. Accordingly, the issue of the claimed right-of-way is a relevant and material part of the basis for the United States' claims. Thus, the violation, of the statute of limitations neither destroys this Court jurisdiction, nor does it remove from the case the issue of whether Elko County has rights in the South Canyon Road. The Supreme Court made the foregoing clear in *Block v. North Dakota,* 461 U.S. 273, 291 (1983), when it stated:

> [U]nlike an adverse possession provision, § 2409a(f) [now § 2409a(g)] does not purport to effectuate a transfer of title. If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet title is deemed time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on its merits.

The Settlement Agreement here recognizes the foregoing by having the parties agree to not further contest the issue (to protect each from an adverse decision), but to acknowledge each other's claim and to work together to accomplish those things in the best interest of each. Accordingly, jurisdiction is not an issue which would preclude consideration of or implementation of the Settlement Agreement. It is for these reasons that the authorities cited by TWS are inapplicable. There simply is no disposal of an interest in government land, much less an unauthorized disposal. There is a huge gulf between granting someone an interest in land and refusing to argue about whether they have such an interest. To avoid the risk of an adverse finding, the Government has, in the spirit of compromise, elected to do the latter.

Having addressed the jurisdictional issue of the statute of limitations, the Court addresses the question of whether the statute of limitations was violated. The Court need not, and does not, reach a conclusion about this issue. But it does find that there is sufficient evidence to sustain a judgment for either party on this issue. Factually the issue is far from clear.

The statute of limitations in question, 28 U.S.C. § 2409(f), requires that a civil action (to quiet title) must be commenced within twelve years of the time the claimant or his predecessor in interest knew or should have known of the claim of the United States.

Even the United States acknowledges that it is not clear whether the 12-year period had run when Elko County made its claim in 1999, and that from the evidence presented at the hearing one could argue that no action by the United States prior to 1998 could reasonably be construed as asserting exclusive ownership or denying the right-of-way's very existence. Indeed one could so argue and Elko County has.

For several decades the Government and Elko County enjoyed a working relationship, under a number of Cooperative Agreements, in which both shared in the costs and responsibilities of maintenance of the South Canyon Road. Elko County contends that during the 1960s, 1970s and up until the end of 1989, when the Wilderness area was expanded to Snowslide Gulch, it continually maintained the Road between Pavlak Grade and Snowslide Gulch. The original Wilderness designation boundary was at the Perkins Cabin. The Road was closed south from Snowslide Gulch in 1970 (which was not contested by Elko). The United States gave notice that it was contemplating expanding, and then did expand the Wilderness boundary to Snowslide Gulch in December 1989. But Elko County makes no claim of a right-of-way south of Snowslide Gulch, acknowledging that it significantly moved the location of the road out of the right-of-way area and up the side of the canyon. Elko County's claim, and the Settlement Agreement only affects the road to Snowslide Gulch, Elko County's claim was made within twelve years of that expansion of the Wilderness area.

Even in the 1970s, when a turnaround was placed at Snowslide Gulch, this was done with the full consent and approval of Elko County, because the road was considered unsafe and too expensive to maintain properly, and *not* unilaterally by the United States nor in adversity to Elko County's interests. When the citizens group reopened the road without Government approval, in 1986, Elko County contends the response was coordinated between the United States and Elko County and not hostile to its interests.

The United States, to the contrary, could argue that Elko County has admitted that the South Canyon Road is a National Forest System Road. The 1932 map introduced by Elko at the hearing shows a list of "Forest Service Roads to be Maintained by Elko County." The South Canyon Road is on that list. However, it is identified as "County road to head of Jarbidge Canyon," providing a counter argument that the United States recognized it as a "County" road (versus a Forest Service road) even though it was to maintain it.

This discussion could continue, but it is unnecessary. The Court need not, and will not, make a final determination on the statute of limitations issue, but it must confess that the evidence presented to date appears to favor Elko County on the issue.[4]

III. THE EXISTENCE OF A R.S. 2477 RIGHT-OF-WAY

Like the statute of limitations issue, the Court need not and will not make a definitive determination about the existence of an R.S. 2477 right-of-way, nor the lack thereof. Unlike the statute of limitations issue, no one appears to have the edge on this issue. The vast majority of the evidence presented to the Court at the hearing, and subsequent thereto, was presented to address this issue.

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[4] This does not preclude the presentation of additional evidence or testimony should the matter actually go to trial.

Most of the evidence, both in favor of and in opposition to the question, is circumstantial and would require the fact finder to draw conclusions that seemed most reasonable. This is not an issue that could be addressed by summary judgment. There are too many material issues of fact that cannot be concluded as a matter of law or to which the parties agree. The significance of the circumstantial evidence, or lack thereof, would, of necessity, be a very subjective determination.

By way of example, the Court will identify some of the evidence and testimony and the possible conclusions or inferences that can be drawn therefrom. The following will not be an exhaustive treatment of all the evidence.

The parties called witnesses expert in various fields. The Court declines to render judgment on the level of their expertise or the validity of their opinions, but will note some of the weaknesses in the bases of their opinions or conclusions.

The purpose of the following is to demonstrate that the evidence is far from conclusive as to any position or claim, and that the United States and Elko County were justified in reaching a compromise settlement to avoid the risk of a potential adverse judgment had the litigation proceeded to judgment.

Precisely what is required to establish an R.S. 2477 right-of-way is an unsettled issue. For that reason, for purposes of making the decision here, the Court begins with the premise that the federal statute in question, which established R.S. 2477 right-of-ways, and which was then repealed without prejudice to any existing right-of-ways established under the law, requires a construction in favor of the United States. That premise, however, does not require the Court to find for the United States merely because the evidence is circumstantial. The Court also begins with the premise that the right-of-way can be established by evidence of a pathway, trial or wagon road, so long as there is evidence of sufficient use by humans. Animal trails do not qualify. But regular use is not precluded by the fact that the use is seasonal because of the winter snows or late springs. Lastly, the Court does not believe that the law requires there be a specific document which identifies and sets aside the road as an R.S. 2477 road or right-of-way. Evidence that it was used by the public and considered a route for human travel could be sufficient.

There is no official documentary evidence that clearly identifies actions specifically intended to establish an R.S. 2477 right-of way. Neither are there any official documentation that establishes that an R.S. 2477 right-of-way was rejected nor denied.

It is uncontested that in order for Elko County to have a R.S. 2477 right-of-way, it had to be established by the time the land was withdrawn and the area identified as part of the National Forest.

There was much testimony about the mining, and cattle and sheep ranching activities in the late 1900s. Evidence was presented about the severe winter of 1889-90 (that, incidently, affected much of the western part of the nation) which killed a large number of the cattle on the large cattle ranches in the area. Following that winter, the ranches turned from cattle to sheep, and by 1906 there were slightly over 392,000 sheep belonging to the 43 owners grazing on the Bruneau Addition (which included the Jarbidge area), and nearly a million sheep by 1908, just prior to the reservation of the Bruneau addition. There is evidence that some of these sheep used the Jarbidge area as their summer range. Elko County's position is that the easiest and most likely point of access would have been north, up the Mary's River Basin and over the easily accessible summit just south of Perkins Cabin at the extreme southern end of the South Canyon.

The United States discounts this argument for a variety of reasons, but its expert never studied the possibility of this access route, notwithstanding the fact that there were ranches, the access to which would have facilitated the movement of the sheep through that area, the topography suggests that it is as easy as, if not an easier access route than the routes where the present roads were subsequently established, and the Forest Service itself has subsequently *improved* a trail from the South Canyon over the summit to the headwaters of the Mary's River Basin. Of significance is the fact that that trail is very short.

The United States also argues that there was a survey conducted by Dennis Scully in 1896 which traversed the South Canyon but did not identify a trail through South Canyon. However, it appears that he also did not make a report of mineralization in the South Canyon, as he was required to do, and his survey was sufficiently deficient that it had to be redone. What conclusions should be made of his record is up for question.

There is no oral or written history of any road or trail in the South Canyon prior to 1894, nor do any maps show any trial or road prior to that time. Apparently there are not even any maps which show a road before 1911. But the existence of a road on a map in 1911 does not preclude a finding that the road was built before that time. Indeed, TWS's Appendix, Exhibit C, contains a letter from Robert D. Williams, of the United States Department of Interior, Fish and Wildlife Office, dated February 17, 1998, to Ben Seminoe, Assistant Forest Supervisor, makes the following statement on page 2:

> Data indicates 65 percent of the Jarbidge basin has a 45 percent or greater slope, and *was heavily grazed and logged at* ***the turn of the century***. Debris from the various high gradient side drainages such as Snowslide, Gorge, and Bonanza gulches provide the river-bottom with large volumes of angular rock material. Historic data indicates this material has moved down these gulches at regular intervals, destroying the **road** at crossings, and changing the river channel. [emphasis added].

If logging operations were conducted at the turn of the century, it would be a reasonable conclusion that roads were established to facilitate those logging operations.

The Court finds the arguments about whether Native Americans used the canyon or not to be less than compelling for either side. It is pure speculation.

There is a great deal of evidence about mining activities in the area beginning with Mormon prospectors in the area as early as 1860; the establishment of the Mardis Mining District, a few miles from the Jarbidge Canyon, in 1872; John Pence and sheep herder Isham's discovery of ore above the canyon floor in the 1880s; and the Winters placer mining claims of April 1894 in and around the South Canyon.

Both the United States and TWS argue that these claims precluded the establishment of a road, notwithstanding that the required work to "prove up" the claims was never done. They argue that this does not void the claims until a subsequent claim challenges the original claim or a governmental entity challenges it. It is probably an issue which combines questions of fact and law, but the establishment and use of a road may well constitute a sufficiently unanswered challenge to the claims to consider them void, at least as to the area of the right-of-way. Furthermore, it would be the claim owners, not the United States (unless it is declaring the claims void) nor TWS, who would have standing to challenge the right-of-way.

The existence of the mining claims would seem to argue for, not against, the existence of a road (the Court uses the term here generically to include a public trail or path) to provide access to the claims.

The most compelling circumstantial evidence of the existence of a road is the direct evidence regarding the land claims and the existence of the Perkins Cabin. Perkins Cabin lies at, or near the end of the old South Canyon Road, and near the summit beyond which lies Mary's River Basin. But it is not only the proximity of Mary's River Basin that makes the cabin's existence significant, however.

The record is unclear when the Perkins Cabin was built. It is clear that it was purchased by William F. Mahoney in 1905, so it had to be built before that time. If the fact finder accepts the United States' and TWS's claim that the access to the Jarbidge Canyon was initiated at points north of the South Canyon, common sense would require that there had to be a road from the area north of the South Canyon, into the South Canyon to the cabin site, both to bring the materials to construct the cabin, and to access the cabin after it was built. Even the United States' witness, Ms. Richa Wilson's report noted that in a 1912 map there was depicted a route from Jarbidge Canyon through the divide, south of Perkins' Cabin to the Mary's River Basin. She believes the route was begun in 1910, after the Bourne gold discovery, but there is nothing to preclude its existence even prior to that time. If it was a viable route then, it was no less viable earlier. Mr. Mike Price's topographical analysis shows that route to be five miles shorter and take two hours less time to traverse than the other routes into the Canyon.

While the evidence of activity in the last three decades of the 1800s is somewhat uncertain and unspecific as to the existence of a road, the above is clear evidence of a road at least four or five years before the critical year of 1909 in connection with the establishment of the National Forest there. Throughout the years thereafter, there is no question that a road existed. The only question is whether it was a County Road or a Forest Service Road, and that issue is discussed above.

This Court will not, and need not, make an ultimate finding with respect to the existence of a road, and whether it qualifies as an R.S. 2477 right-of-way, the foregoing, together with all the other evidence produced at the hearing clearly establishes a colorable claim which the United States could not and cannot ignore as a risk of a potential adverse decision. Should it lose to Elko County on this issue, it would likewise lose all control or input into the future maintenance of the Road. The Settlement Agreement avoids that risk and permits the United States to fulfill its responsibilities to protect the environment and the public.

IV. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE AND REASONABLE

The opposition to the Settlement Agreement by TWS is three-fold. (1) It contends that Elko County has no R.S. 2477 right-of-way. (2) It contends that even if it has a right-of-way, the statute of limitations has run precluding it from asserting a claim for a right-of-way and denying this Court jurisdiction in this matter. And, (3) it contends that the Settlement Agreement transfers to Elko County an interest in land, specifically a right-of-way without complying with the FLPMA (Federal Land Policy and Management Act of 1976-43 U.S.C. § 1701, *et seq.*).

In sum, the stay of the implementation of the Settlement Agreement is based on a concern by the Court that one or more of these bases may be valid. Now, having the benefit of the presentation of evidence during the five-day hearing, together with the briefing by the parties regarding the applicable law and the facts, this Court concludes that each and all of the contentions are faulty and without merit.

First, there has been no determination that Elko County has an R.S. 2477 right-of-way. There is only the risk, given the evidence available, that the Court could find that such a right-of-way exists. Second, there has not been a determination that the statute of limitations has run, and the odds are that the Court could find it has not. However, even if it is determined that the statute of limitations has run, that neither destroys this Court's jurisdiction over this matter nor precludes Elko County from asserting its claim as a defense against the claims of the United States. Accordingly, this is no issue at all. Third, the Settlement Agreement does not convey or transfer any interest in land, by right-of-way or otherwise. It merely agrees that for purposes of the Settlement Agreement, the United States will not further contest the issue. Accordingly, Elko County's claim remains dorment.

There being no basis for staying the implementation of the Settlement Agreement, the Court turns to a consideration of whether the Settlement Agreement is fair, adequate, and reasonable.

The Settlement Agreement is clearly fair, both procedurally and substantively. The negotiations which led to the agreement was conducted between two governmental entities with qualified counsel. Proposals were made with some rejected, followed by further negotiations. The settlement process involved the participation of neutral U.S. Magistrate Judge, Robert A. McQuaid, and included two days of hearings before Judge McQuaid. There were and are several issues of law and fact in this case on which the United States and Elko County intensely disagree, including whether and when an R.S. 2477 right-of-way was created and what the interests and rights of the parties to the South Canyon Road are. Neither party can claim that the resolution of any of these issues would result in a clear victory. The settlement is by no means lopsided in anyone's favor. Although Elko County does no longer face a challenge to its claim, it must still comply with all federal rules and regulations before performing any improvements on the Road. Although the public will continue to have access to the campgrounds located near the Road and the boundary of the Jarbidge Wilderness Area, the portion of the Road or trail located in the Wilderness Area is, and will be, closed to vehicular traffic. The interests and needs of both the United States and Elko County, as well as the public, are protected and furthered by this agreement.

It is important to remember that both TWS and the Court's only objection to the Settlement Agreement was the affect of the "do not contest" clause. That objection has been resolved to the satisfaction of the Court, but TWS apparently still holds to its view. As noted above, the Forest Service, in an obvious attempt to assure that the Settlement Agreement was not contrary to is own procedures and regulations, completed the environmental review and decision making procedures required under the FLPMA. It issued decisions on April 27, 2005 and May 31, 2005. The first addressed the South Canyon Road. It was appealed by TWS and others, and was affirmed. The second decision has not been appealed. TWS does not even seriously challenge the Forest Service decision to reopen and maintain the South Canyon Road as a high clearance vehicle route. However, it filed a Protective Administrative Appeal to protect its rights, with a promise to withdraw that appeal if Elko County did not appeal. Elko County did not appeal, but TWS has not withdrawn the appeal as promised. It apparently continues to labor under the mistaken view that the Settlement Agreement conveys to Elko County an interest in land. It is hoped this decision will allay those fears.

This Court stayed the Agreement for fear that the United States had granted a right-of-way to Elko County without having fulfilled the requirements of FLPMA and NEPA. That decision was based upon insufficient evidence, which has since been rectified. Furthermore, even assuming it was a justified basis for staying the Agreement, that basis no longer exists. The Government has now completed all environmental studies that these governing statutes require.

This Court finds that the Settlement Agreement is fair, adequate and reasonable, and conforms to all applicable law. It further finds that the Department of Justice has full authority to enter into this compromise Settlement Agreement, and that it is in the best interests of the public and the governmental entities involved. The Court, having been provided with good and sufficient evidence and law, further finds that its previous concerns regarding the Settlement Agreement were without basis and the Stay should be lifted and the Settlement Agreement implemented in full and without delay.

IT IS SO ORDERED, this 19th day of September, 2006.

/s/ Roger L. Hunt

ROGER L. HUNT

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN C. CARPENTER, individually and as agent for CITIZENS UNITED FOR THE SOUTH CANYON ROAD; O.Q. JOHNSON, individually; GRANT GERBER, individually; and ELKO COUNTY, NEVADA, Defendants, THE WILDERNESS SOCIETY and GREAT OLD BROADS FOR WILDERNESS, Applicants for Intervention.	CV-N-99-547-DWH(RAM) **ORDER** (Filed Jun. 13, 2003)

Before the court are a number of interrelated filings. Intervenors, The Wilderness Society and Great Old Broads for Wilderness (collectively "TWS"), filed a motion on December 17, 2002 to vacate the settlement and for a scheduling order, which includes a request that this court formally grant their motion to intervene (#142). At the time of its submission, this motion lacked supporting points and authorities.

Defendant Elko County and plaintiff, the United States, filed oppositions (##145, 147) and TWS replied (##157, 158). TWS eventually filed points and authorities in support of its motion to vacate on April 11, 2002 (#155), but that filing was identical to its original motion (#142). In its reply to the United States' opposition, however, TWS did submit extensive points and authorities (#157). Because TWS's reply allegedly contained arguments not raised in its motion, the United States filed a motion for leave to file a surreply (#163).

The second submission before the court is Elko County' motion to deny intervention, or in the alternative, to dismiss under Fed. R. Civ. P. 12(b)(6) (#145, 146). TWS filed an opposition (#159) and Elko County replied (#160).

Finally, the United States filed a motion to dismiss TWS's cross-claims (#154) on jurisdictional grounds, to which TWS filed an opposition (#156) and the United States replied (#162).

Since TWS's reply arguably contains issues not raised in its motion, the United States' motion for leave to file a surreply is granted and this court will consider all of the filings currently before the court.

I. Background

This case involves a dispute over ownership of the South Canyon Road (the "Road") also called Forest Service Road #064; located in Elko County.

Nevada. The Road is a dirt track that runs along the West Fork of the Jarbidge River in the Humboldt-Toiyabe National Forest and leads into the Jarbidge Wilderness at the Snowslide Gulch trail head, all managed by the United States Forest Service ("Forest Service"). Historically, the Road has been prone to dirt slides and flooding that have forced the Forest Service to close it for extended periods of time both for safety reasons and to protect environmental resources. (TWS's Reply (#157), Ex. 3.) The West Fork Jarbidge River is home to Bull Trout, which was listed as a threatened species in 1999.

As early as 1975, the Forest Service and residents of Elko County have wrangled over whether the Road should remain open to vehicular access or closed to prevent further detrimental impact to the river. (*See id.*) According to Elko County; before the current controversy, the Road provided "public and systematic access for commercial, recreational and religious purposes from at least the intersection of what is known as Pavlak Grade to what is known as Perkins Cabin, for Native Americans, trappers, miners, livestock owners, homesteaders, and visitors." (Elko County's Answer and Counterclaim (#9) at 6.) Following a flood in 1995 when the Road was again washed out, the Forest Service elected to rebuild the Road, a decision that was appealed by Trout Unlimited, citing concerns over possible damage to Bull Trout habitat. (TWS's Reply (#157), Ex. 6.) On appeal, the Regional Forester remanded the decision back to the Forest Supervisor for further analysis of future effects on the

Bull Trout caused by reconstruction of the Road and the possibility that the Road might fail in the event of future flood event. (*Id.*)

During this time period, Elko County requested that the Forest Service grant it a right-of-way in the Road, which the agency denied because of continued concern over the Bull Trout. (*Id.* at Ex. 8.) Thereafter, the Elko County Board of Commissioners passed a resolution asserting ownership over the Road and ordering that the Elko County Road Department rebuild it. (*Id.* at Ex. 10.) The Forest Service responded by letter on July, 21, 1998 that "[w]e are unaware of any evidence that would support the position that the County has a right-of-way to maintain or reconstruct the South Canyon Road." (*Id.* at Ex. 11.) Nevertheless, Elko County employees began rebuilding the Road using heavy equipment in late July 1998. (*Id.* at Ex. 6.)

The Forest Service filed this suit in October 1999 against several Elko County individuals involved in the Road reconstruction claiming that the Road is located on land owned by the United States government. The government sought injunctive relief through a finding by the court that any attempt to restore the Road without the required federal permits constitutes common law trespass and will harm the Bull Trout, resulting in a "take" in violation of the Endangered Species Act. (Compl. (#1) at ¶¶ 26, 31.)

After filing its complaint, the government immediately moved the court for a temporary restraining order and preliminary injunction against the named defendants preventing them from undertaking any construction activity to restore the Road. On October 7, 1999, this court granted the government's motion and issued an order (#3) that prevented the named defendants and anyone acting in concert with them from "performing or assisting others to perform, directly or by implication, any work on the South Canyon Road or in the West Fork of the Jarbidge River."

Thereafter, as allowed by LR 16-5, this court referred this case to mediation at the U.S. Institute for Environmental Conflict Resolution (#5).[1] In the same order, pursuant to Federal Rule of Civil Procedure 21, this court ordered Elko County to be named as a defendant to the lawsuit (#5). Elko County filed an answer and counterclaim (#9) pursuant to the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, seeking a declaration by this court quieting title to an easement on the Jarbidge South Canyon Road under the auspices of Section 8 of the act of July 26, 1866, 14 Stat. 253, formerly section 2477 of the Revised Statutes of the United States ("R.S. 2477").

Through a mutually agreed upon neutral mediator, the parties attempted for almost six months to settle this case in early 2000. A proposed settlement agreement was reached in June 2000 and later rejected by the Elko County Commissioners in November 2000. The case was then placed on a fast-track trial schedule. The parties requested to continue settlement talks and later were invited to a confidential settlement conference before Magistrate Judge Robert McQuaid which lasted four days. On March 2, 2001, the parties notified the court that a tentative settlement agreement had been reached and Judge McQuaid lifted the confidentiality order, thereby allowing public dissemination of the proposed settlement agreement. (*See* #103.) Important to the pending motions now before this court, the settlement agreement contained the following provision: "The United States will not now or in the future contest that Elko County has an R.S. 2477 right of way for" the South Canyon Road. (Settlement Agreement, Stipulation and Order (#118), Ex. 1 at 2.)

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[1] When the parties agreed to participate in mediation and take no further action on the South Canyon Road absent further order of this court, the temporary restraining order was dissolved (#10).

On March 30, 2001, TWS filed a motion to intervene as a matter of right in this action, seeking to intervene as a defendant to Elko County's counterclaim. This court denied that motion as untimely (*see* #123), and TWS appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed and remanded with instructions to grant the motion and conduct further proceedings consistent with its opinion. *United States v. Carpenter*, 298 F.3d 1122, 1125-26 (9th Cir. 2002).

TWS subsequently filed a "proposed" answer to Elko County's counterclaim and cross-claims against the United States (#141), which it revised on February 4, 2003 (#151). The cross-claims contained causes of action under Forest Service regulations, 36 C.F.R. Pt. 251, the Federal Land Policy Management Act ("FLPMA"), 42 U.S.C. § 1701, *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. Intervenors request that this court dismiss Elko County's counterclaim, enter judgment in favor of their cross-claims, and provide relief in the form of (1) a declaration that the United States' recognition of a right-of-way in favor of Elko County violated FLPMA, NEPA, and Forest Service regulations; (2) denial of the Stipulation and Order proposed by the United States and the County[2]; (3) a permanent injunction barring the United States from recognizing a right-of-way in favor of the County without comply with FLPMA, NEPA, and Forest Service regulations; (4) reasonable costs and fees; and (5) other relief deemed proper by this court. Elko County and the United States filed motions seeking to have the claims against them dismissed (#146, 154). TWS also filed a motion to vacate the settlement and for a scheduling order (#142). The court addresses these motions below.

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[2] Since a stipulation and order acknowledging the settlement has already been entered (#118), this court will address TWS's request for a denial of the *proposed* stipulation and order as their motion to vacate the settlement (#142).

II. Analysis

A. Local Rule 7-2 and Motion for Leave to File Surreply

Although intervenors' motion to vacate the settlement and for a scheduling order (#142) lacked point and authorities in its support, their later submission, the filing of extensive points and authorities in reply to the United States' opposition, and an opportunity for the United States to file a surreply sufficiently cured the initial omission. Local Rule 7-2(a) requires that "[a]ll motions . . . shall be supported by a memorandum of points and authorities." The rule sets no deadline in which the points and authorities must be submitted, but presumably, an opposing party needs to consider them in order to adequately respond within the 15 days allowed. *See* L.R. 7-2(b). When contemplating how to address noncompliance with local rules, the court must consider "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [opposing party]; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions [than dismissal]." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

Here, intervenors filed what they termed points and authorities in support of their December 17, 2002 motion on April 11, 2003 (#155). As intervenors identified, however, these points and authorities were identical to the original motion and contained no citations to authorities that might support their arguments. (*See* ##142, 155.) Nevertheless, their reply (#158) contained extensive points and authorities in support of their positions, to which the United States filed a motion for leave to file a surreply (#163). Although this court does not condone intervenors' untimely conduct, the public interest in the speedy resolution of a case that has already consumed vast judicial resources convinces this court to consider the filings as they now exist before the court. *See Henderson*, 779 F.2d at 1423. Accordingly, this court will not deny the intervenors' motion on LR 7-2 grounds. Rather, the motion of the United States for leave to file a surreply (#163) is granted and the court will consider the memorandum of points and authorities accompanying that motion and accompanying the intervenors' reply (#158).

B. Motion to Intervene

In its motion to vacate the settlement and for a scheduling order, TWS requested that this court formally grant their motion to intervene as plaintiffs and as defendants to Elko County's counterclaim. (#142 at ¶ 8(a).) Although this court had denied TWS's motion to intervene solely on timeliness grounds and therefore had never addressed the remaining elements required to intervene as of right (*see* #123), the Ninth Circuit remanded with explicit instructions for this court to grant the motion. *See United States v. Carpenter*, 298 F.2d 1122, 1125-26 (9th Cir. 2002). Accordingly, the law of the case requires that this court grant TWS's motion to intervene (#106) and deny Elko County's motion to deny intervention (#146).

C. Alignment of Intervenors

Although TWS initially sought only intervention as defendant to Elko County's counterclaim (*see* #106), it now seeks to intervene as a plaintiff as well (*see* #142 at ¶ 8(a)) in order for this court to consider its cross-claims against the United States. Generally, "an intervenor of right 'is treated as if he were an original party and has equal standing with the original parties.'" *Brown v. Demco, Inc.*, 792 F.2d 478, 480-81 (5th Cir. 1986), quoting *Donovan v. Oil, Chemical, and Atomic Workers Int'l Union, and its Local 4-23*, 718 F.2d 1341, 1350 (5th Cir.1983), *cert. denied*, 466 U.S. 971 (1984). The intervenor, therefore, can participate fully in the litigation. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997). In determining whether the intervenor will be treated as a plaintiff or defendant, the court is required "to penetrate the nominal party alignment and to consider the parties' actual adversity of interest." *Dev. Fin. Corp. v. Alpha Hous. & Health Care, Inc.*, 54 F.3d 156, 159-60 (3rd Cir. 1995) (internal citations omitted). It is the duty of the court to "'look beyond the pleadings, and arrange the parties according to their sides in the dispute.'" *City of Indianapolis v. Chase Nat. Bank of City of New York*, 314 U.S. 63, 69 (1941), *quoting Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust*

Co., 197 U.S. 178 (1905). As the Supreme Court has concluded, "Whether the necessary collision of interest exists is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute." *Id.* (internal quotations omitted).

Here, intervenors' alignment as plaintiffs is appropriate because their interests are adverse to Elko County's claim to an RS 2477 right of way, the existence of which is the primary matter in dispute. TWS's cross-claims against the United States to force compliance with federal statutes and regulations do not alter the fact that ownership of the South Canyon Road is the foremost controversy in this suit. Thus, even if TWS initially sought intervention solely as a defendant to Elko County's counterclaim, their wish to enter the suit as a plaintiff in order to bring cross-claims against the United States is not precluded. *See id.* As a practical matter, however, since it has no property interest in the South Canyon Road, TWS has no cause of action against defendants in trespass and can not litigate a Quiet Title Act claim. *See infra*, Pt. II.D.2; *Long v. Area Manager*, 236 F.3d 910, 915 (8th Cir. 2001). Only to the extent, then, that TWS brings cross-claims against the United States, is its motion to intervene formally granted by this court.

D. Standing

Generally, no independent standing inquiry is necessary for intervention because standing is implicit in the "protectable interest" requirement of Rule 24. *Portland Auaubon Soc. v. Hodel*, 866 F.2d 302, 308 n.1 (9th Cir. 1989). However, since the Ninth Circuit instructed this court to grant TWS's motion before a thorough Rule 24 analysis could be completed, a standing evaluation is necessary here. *See United States v. Carpenter*, 298 F.3d 1122, 1125-26 (9th Cir. 2002).

TWS must meet both constitutional and prudential requirements in order to have standing before this court. To satisfy Article III's case or controversy requirement, a litigant must establish (1) that he has suffered an injury-in-fact; (2) that the injury is traceable to the challenged action of the defendant; and (3) that the injury can be remedied by a favorable decision. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001). Importantly, a plaintiff "must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (citations omitted). The Ninth Circuit has held that "[i]ntervenors in environmental litigation satisfy the injury in fact requirement by showing that group members have direct contact with the environmental subject matter threatened by an adverse decision." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995). Moreover, "[t]he recreational or aesthetic enjoyment of federal lands is a legally protected interest whose impairment constitutes an actual, particularized harm sufficient to create an injury in fact for purposes of standing." *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1176 (9th Cir. 2000); *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000).

Beyond meeting constitutional requirements, the intervenors' claims must also fall within the zone of interests sought to be protected by the federal statutes they evoke in order for prudential considerations to warrant awarding them standing. The Administrative Procedure Act (APA) grants standing in federal court to "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. The Supreme Court has interpreted this provision to require that the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

1. Standing to Bring Cross-Claims

In this case, TWS has proffered adequate evidence to demonstrate that it satisfies the constitutional and prudential standing requirements to bring its cross-claims against the United States. The affidavits of Marjorie Sill and Kathleen Fite evince that members of TWS have suffered harm to their recreational and aesthetic enjoyment of the Jarbidge Wilderness as a result of human-made disturbances to the South Canyon Road. (*See* Intervenors' P. & A. Reply (#158), Exs. A and B.) Their injuries were caused by the activities of defendants to rebuild the washed out road and will continue to exist because the settlement agreement virtually ensures that the Road will remain open to motorized use, causing damage to the river and the surrounding environment. (*See id.*) Moreover, a judicial finding in their favor – in other words, this court vacating the settlement and requiring that the United States comply with NEPA, FLPMA, and Forest Service regulations – would redress these injuries because compliance would instigate the carrying out of a host of procedural formalities that TWS requests. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (finding that in cases of procedural injuries, plaintiffs do not need to "demonstrate that the ultimate outcome following proper procedures will benefit them"). As a result, TWS satisfies the Article III standing requirements.

In addition, the zone of interest encompassed by the statutes and regulations cited by TWS includes their claims. The laws cited by TWS mandate that government agencies follow certain procedures before granting a right-of-way on government land. Ecological and aesthetic injuries resulting from road building activities on the South Canyon Road, where TWS's members recreate and do scientific study, are within the zone of interests of statutes designed to ensure that certain procedures are followed in the management of public lands. *See Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979) (finding that the "ecological and aesthetic injuries" resulting from the construction and operation of a plant in areas where the group members lived, worked, or spent their leisure time were within NEPA's zone of interests). As a result, TWS has standing to bring its cross-claims against the United States.

2. Standing to Defend Against Elko County's Quiet Title Act Counterclaim

However, TWS has neither constitutional nor prudential standing to defend against Elko County's counterclaim under the Quiet Title Act (QTA). The QTA provides in pertinent part: "The United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a(a). The QTA is the exclusive means by which a litigant can challenge title of the United States to real property. *Block v. North Dakota*, 461 U.S. 273. 286 (1983). In addition, the text of the QTA suggests that a plaintiff who brings suit under the statute must have an interest in the disputed property: "[The complaint] shall set forth with particularity the nature of the right, title or interest which the plaintiff claims in real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d);

see also Long v. Area Manager, 236 F.3d 910, 915 (8th Cir. 2001) (holding that one can not assert a QTA claim who "does not claim a property interest to which title may be quieted"). Having no property interest in the South Canyon Road, TWS can not meet the injury-in-fact requirement and therefore lacks constitutional standing. *See Long*, 236 F.3d at 915.

Similarly, the zone of interests that the QTA was designed to protect can not encompass TWS because a claimant must have an interest in the land in question in order to benefit from the statute. *See id.* Since the QTA only addresses the grievances of those alleging property rights contested by the United States, it can not be interpreted to safeguard TWS's interests. As a result, in the absence of any property interest in the South Canyon Road, TWS lacks standing to defend against the counterclaim brought by Elko County.

E. Jurisdiction over Intervenors' Cross-Claims

This court has jurisdiction over TWS's claims because they are transactionally related to the original suit brought by the United States. Generally, where intervention is "of right" under Fed. R. Civ. P. 24(a), an intervenor's claim is deemed supplemental to the main action. 28 U.S.C. § 1367(a). Thus, no independent basis for federal jurisdiction need be established as long as the intervenor's claims are transactionally related to the plaintiff's claims. *Id.* Moreover, an intervenor of right may assert cross-claims without an independent jurisdictional basis. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 617 n.14 (1966); *Maseda v. Honda Motor Co., Ltd.*, 861 F.2d 1248, 1253 n.8 (11th Cir. 1988). Here, TWS's claims relate to those originally brought by the United States in that they assert that the government owns the Road and therefore could not enter the settlement agreement without complying with certain federal statutes and regulations. Indeed, had the United States not entered the settlement, no basis for TWS's cross-claims would even exist. Accordingly, because TWS's claims are transactionally related to the underlying suit initiated by the United States, this court has subject matter jurisdiction over them.[3]

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[3] As a result, this court need not assess for jurisdictional purposes – as the parties have argued – whether (1) the settlement agreement constituted a disclaimer of the United States' interests and therefore deprived this court of jurisdiction, *see Lesnoi, Inc. v. United States (Lesnoi III)*, 313 F.3d 1181, 1184 (9th Cir. 2002); (2) intervenors' claims of wrongdoing on the part of the United States in entering the settlement agreement sufficiently placed a cloud on Elko County's claims to title in the South Canyon Road to support this court's initial jurisdiction under the Quiet Title Act, *see Lesnoi, Inc. v. United States (Lesnoi I)*, 170 F.3d 1188, 1192 (9th Cir. 1999); or (3) the APA could serve as an independent basis of jurisdiction for the intervenors' cross-claims, *see Donnelly v. United States*, 850 F.2d 1313. 1317-18 (9th Cir. 1988); *Lee v. United States*, 809 F.2d 1406, 1409 n.2 (9th Cir. 1987).

F. Availability of Judicial Review under the APA

However, because a settlement agreement entered into by the Attorney General is not an "agency action" under the APA, this court has no jurisdiction to review the intervenors' cross-claims under that statute. The United States asserts that no judicial review under the APA is available because the Department of Justice has the exclusive power to conduct litigation in which it represents an agency pursuant to 28 U.S.C. §§ 516, 519. As discussed further in Section II.I below, this provision does not give the Attorney General carte blanche to settle disputes in a manner inconsistent with federal statutes or regulations. *See Executive Business Media, Inc. v. U.S. Dept. of Defense*, 3 F.3d 759, 761-62 (4th Cir. 1993).

Nevertheless, because the settlement agreement entered into by the Department of Justice was not an "agency action," judicial review under the APA is not available. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The statute defines agency action to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). In the instant action, once the government began litigating ownership of the South Canyon Road, the dispute at issue was turned over from the Forest Service to the Justice Department.

See 28 U.S.C. §§ 516, 519; *See United States v. Am. Prod. Indus., Inc.*, 58 F.3d 404, 407 (9th Cir. 1995). As a result, it was the Department of Justice and not the Forest Service which entered into the settlement agreement, so the Forest Service never had the opportunity to embark an notice and comment decision-making that might be reviewable under the APA. *See Sharman Co. v. United States*, 2 F.3d 1564, 1571 (Fed. Cir.1993) (explaining that "once a claim is in litigation, the Department of Justice gains exclusive authority to act in the pending litigation") Since the litigation decisions of the Attorney General are not agency actions subject to the procedural mandates of the APA, this court has no power of review under that statute. *See* 5 U.S.C. § 551(13); 28 U.S.C. §§ 516-519. Accordingly; the cross-claims of the intervenors must be dismissed because they fail to state a cause of action under the APA.

G. Elko County's Motion to Dismiss

Having dismissed intervenors' cross-claims as described above, Elko County's motion to dismiss them (#146) is denied as moot.

H. Intervenors' Motion to Vacate Settlement and for Scheduling Order

Having dismissed their underlying claims, this court denies intervenors' motion to vacate the settlement and for a scheduling order (#142) as moot.

I. Settlement Agreement

Because the government circumvented certain procedural mandates imposed by Congress upon entering the settlement agreement, this court must stay the effectiveness of the agreement pending the government's compliance. The Attorney General's broad discretion and plenary authority to control litigation does not authorize him to settle disputes in a manner inconsistent with statutes or regulations which have the force of law and which implement congressional directives. *Executive Business Media, Inc. v. U.S. Dept. of Defense*, 3 F.3d 759, 761-62 (4th Cir. 1993). As one appellate court aptly expressed, "We think it alien to our concept of law to allow the chief legal officer of the country to violate its laws under the cover of settling litigation. The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality." *Id.* at 762. A court can vacate a settlement agreement entered into by the United States if the extent of government misconduct constitutes a structural defect that voids the judgment as fundamentally unfair. *See Dufresne v. Comm'r, Internal Revenue Serv.*, 26 F.3d 105, 107 (9th Cir. 1994).

In addition, the analogy between a settlement agreement and a consent decree renders case law on the latter applicable to the former. A consent decree is "essentially a settlement agreement subject to continued judicial policing." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990), *quoting Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.1983). Like a settlement agreement, a consent decree "is the product of negotiation and compromise." *Id.* The Ninth Circuit has construed settlement agreements as consent decrees, reviewing a district court's decision to accept a settlement for abuse of discretion. *See id.* Therefore, before approving a settlement, a district court "must be satisfied that it is at least fundamentally fair, adequate and reasonable" and conforms to applicable laws. *Id.* at 580-81: *see Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990). If the district court later learns that this standard was not met, it may set aside the agreement pending compliance. *See* Fed. R. Civ. P. 60(b); *Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d 1340, 1343 (9th Cir. 1978) (articulating that the exercise of authority to vacate or otherwise modify the prospective effect of an equitable decree lies within the discretion of the trial court, guided by traditional principles of equity jurisprudence).

Here, the arguments made by the United States in its filings to oppose the intervenors' motion to vacate reframed its original stance regarding the effect of the settlement agreement, thereby providing this court with new evidence that the settlement effected the granting of a right-of-way to Elko County. When this court entered a stipulation and order accepting the settlement, the language of the agreement, in which the United States agreed that it "will not now or in the future contest that Elko County has an R.S. 2477 right of way for" the South Canyon

Road, was sufficiently ambiguous to preclude this court from concluding that the settlement constituted a disclaimer of ownership or the granting of a right-of-way. In questioning the jurisdiction of this court to hear the intervenors' cross-claims, however, the United States insisted that it had disclaimed any property interest in the South Canyon Road via the settlement agreement. (*See* United States' Mot. Dismiss Intervenors' Cross-Claims (#154) at 16:14-18.) The United States unequivocally proclaimed that it "disclaim[ed] an interest in real property subject only to the court's confirmation of that disclaimer." (*Id.* at 16:22-24.) This position sharply contrasts with the Forest Service's historical stance regarding its ownership of the Road and runs counter to considerable evidence before the court, including the settlement agreement itself. (*See* Intervenors' P.&A. (#156/157), Exs. 2-8; Stipulation and Order (#118), Ex. 1 (reserving the right of the United States to initiate condemnation proceedings).) If the United States indeed disclaimed its property interest in the Road, this disclaimer equates to the issuance of a right-of-way, which triggers the requirement that the government comply with FLPMA, NEPA, and Forest Service regulations. *See* 43 U.S.C. § 1761(a)(6)-(b), 42 U.S.C. § 4332(2)(C), 36 C.F.R. §§ 251.53(1)(6)-251.55, 40 C.F.R. § 1501.4. Having acquired this new evidence, this court no longer finds the settlement to be fundamentally fair to the public interest because it allows the government to circumvent the procedural mandates laid out by Congress. *See United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). As a result, pursuant to FED. R. CIV. P. 60(b), this court stays the effectiveness of the settlement agreement pending compliance by the Forest Service with these laws. *See Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d 1340, 1343 (9th Cir. 1978).

III. Conclusion

Accordingly, **IT IS ORDERED** that:

(1) TWS's motion to intervene (#106) is **GRANTED** only with regard to its cross-claims against the United States. TWS has no standing to defend against Elko County's counterclaim, so its participation in this regard must cease;

(2) Elko County's Motion to Deny Intervention is **DENIED** and its alternative Motion to Dismiss for Failure to State a Claim (#146) is **DENIED** as moot;

(3) The United States' Motion to Dismiss TWS's Cross-Claims (#154) is **GRANTED**;

(4) TWS's Motion to Vacate the Settlement and for a Scheduling Order (#142) is **DENIED** as moot.

(5) The effectiveness of the settlement agreement (#118) is **STAYED** pending compliance by the Forest Service with the requirements of FLPMA, NEPA and any associated regulations triggered by the granting of a right-of-way to Elko County.

DATED: This 13th day of June, 2003.

/s/ David Hagen
UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Counter-Defendant-Appellee.
v.
JOHN C. CARPENTER; GRANT GERBER; O. Q. JOHNSON,
Defendants,
and
COUNTY OF ELKO,
Defendant-Counter-Claimant-Appellee,
THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS,
Defendants-Intervenors-Appellants.

No. 01-16326
D.C. No. CV-99-00547-DWH
OPINION

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted
June 12, 2002 – San Francisco, California

Filed August 12, 2002

Before: Mary M. Schroeder, Chief Judge,
Dorothy W. Nelson and
Stephen Reinhardt, Circuit Judges.

Per Curiam Opinion

COUNSEL

Eric E. Huber, Earthjustice Legal Defense Fund, Inc., Denver, Colorado for the defendants-intervenors-appellants.

Blaine T. Welsh and Steven W. Myhre, U.S. Department of Justice, Environment & Natural Resources Division, Las Vegas, Nevada for the plaintiff-counter-defendant-appellee.

Kristin A. McQueary, Office of Elko County District Attorney, Elko, Nevada for the defendant-counter-claimant-appellee.

OPINION

PER CURIAM:

Two environmental organizations, The Wilderness Society and Great Old Broads for Wilderness, appeal the denial of their motion to intervene as of right in a suit between the United States, Elko County, Nevada, and a private defendant over the status of a road on U.S. Forest Service land. The appellants sought to intervene to object to a proposed settlement agreement, and they filed their intervention petition soon after the proposed agreement was made public on March 2, 2001. The district court denied the motion on timeliness grounds because the suit had been pending for more than eighteen months. We have jurisdiction under 28 U.S.C. § 1291. *Southwest Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 817 (9th Cir. 2001). We now reverse, because the interveners acted promptly after they had notice that the government may not have adequately represented their interests in negotiating the settlement, and they were entitled to rely on the presumption of adequate representation by the government prior to that time. *See, e.g., Forest Conservation Council v. U.S. Forest Svc.,* 66 F.3d 1489, 1499 (9th Cir. 1991).

In October 1999, the Forest Service sued representatives of a citizens group, seeking declaratory and injunctive relief to stop them from trespassing on Forest Service land to restore a washed-out road. The road in question, the South Canyon Road in Elko County, Nevada, is adjacent to a river populated by Bull Trout, a threatened species listed on the Endangered Species list. In November 1999, the district court joined Elko County as a party defendant, because it claimed rights to restore the road. The court sent the parties to mediation conducted by a private mediator, which the parties agreed would be confidential.

The parties returned to court after months of unsuccessful negotiations, and the district court ordered further confidential settlement proceedings, this time before a Magistrate Judge. On March 2, 2001, the parties notified the court that they had reached a tentative agreement, and the court lifted the confidentiality order covering the mediation proceedings so that the agreement could be publicly disseminated. The United States agreed that it would not contest that Elko County had a right of way to the road, but did not waive its authority to manage federal lands and natural resources in accordance with federal environmental laws. The defendants agreed that they would not do any work on the road without receiving prior approval from the Forest Service and that they would comply with federal environmental laws.

The Wilderness Society and Great Old Broads for Wilderness, citizens groups devoted to preserving wilderness and wildlife in public lands, moved to intervene as plaintiffs on March 30, 2001, asserting that the proposed settlement agreement improperly ceded a property interest in the road to the County of Elko, thereby substantially diminishing the environmental protections for the adjacent wilderness areas. The district court approved the settlement, denied the motion to intervene as untimely, and entered a final order. The Wilderness Society and Great Old Broads for Wilderness appealed.

[1] We review for abuse of discretion a district court's determination that an application for intervention is untimely. *Officers for Justice v. Civil Svc. Comm'n of the City & County of San Francisco,* 934 F.2d 1092, 1095 (9th Cir. 1991). Timeliness is measured by reference to "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay." *County of Orange v. Air Calif.,* 799 F.2d 535, 537 (9th Cir. 1986).

When the district court held that appellants' motion to intervene was untimely, it noted that they had filed the motion eighteen months after the complaint was filed, after six months of court-ordered mediation, and four days of settlement negotiations in front of a magistrate. The court also concluded that intervention would likely derail the parties' settlement. It found intervenors' argument that they did not know the Forest Service would not protect their interests unconvincing since they knew the issues and that the parties were attempting to reach a settlement.

[2] We disagree. The intervenors acted as soon as they had notice that the proposed settlement was contrary to their interests. The mediation proceedings had been conducted under an order of confidentiality and the settlement negotiations were not conducted in open court. By entering into confidential settlement discussions the government does not give notice that it may not be adequately representing the interests of any group of citizens. We wish to encourage, not discourage, the government's participation in settlement discussions. More importantly, settlement negotiations would be severely impaired if every party that the government represents could intervene to participate as a matter of right simply because the negotiations were conducted in a confidential manner. For these reasons, we invoke the principle that until parties have notice that the government may not be representing their interests, parties are entitled to rely on the presumption that the government is representing their interests. *E.g., Forest Conservation Council,* 66 F.3d at 1499 ("a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee").

[3] The district court was understandably concerned about the possibility that the settlement might be delayed and the consequent prejudice. That concern does not override the fact that prior to the announcement of the proposed agreement, the appellants were entitled to rely on the government to adequately protect their interests. It was only when the intervenors learned that the settlement constituted a substantial departure from the position that the government had maintained throughout the litigation that they sought to intervene.

We have, on occasion, been reluctant to require the granting of motions to intervene where lengthy settlement efforts might be disrupted and the applicants for intervention had notice of the existence of the suit. *See Air Calif.,* 799 F.2d at 537; *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir. 1978). Those cases did not involve a claim of failure of a governmental agency to represent its citizens. The intervenors in the *Alaniz* case were all private class members who had received individual notices regarding the settlement process. *Id.* at 659 n.3. The *Air California* case involved a refusal to allow a city to intervene in a suit that another city, a county, and citizens' groups had settled; there is no presumption that one governmental entity represents another. *Air Calif.*, 799 F.2d at 537.

[4] In this case, the district court erred in denying appellants' motion to intervene. We reverse and remand with instructions to grant the motion, and for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-counter-defendant-Appellee. v. JOHN C. CARPENTER, Defendants, GRANT GERBER; Q. JOHNSON, O., Defendants, and COUNTY OF ELKO, Defendant-Appellee, THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS, Defendants-Intervenors-Appellants.	No. 06-15596 D.C. No. CV-99-00547-RLH/RAM District of Nevada, Reno **MANDATE** (Filed Sep. 16, 2008)

The judgment of this Court, entered 5/20/08, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/ Lee-Ann Collins
By: Lee-Ann Collins
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-counter-defendant-Appellee. v. JOHN C. CARPENTER, Defendant, GRANT GERBER; Q. JOHNSON, O., Defendants, and COUNTY OF ELKO, Defendant-Appellee, THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS, Defendants-Intervenors-Appellants.	No. 06-15596 D.C. No. CV-99-00547-RLH/RAM District of Nevada, Reno ORDER (Filed Aug. 1, 2008)

Before: SCHROEDER, D.W. NELSON, and REINHARDT, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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No. 08-571

In the Supreme Court of the United States

ELKO COUNTY, NEVADA, PETITIONER

v.

THE WILDERNESS SOCIETY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH A. PETERSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an intervenor as of right pursuant to Federal Rule of Civil Procedure 24 must establish independent standing.

2. Whether an intervenor as of right in an action brought pursuant to the Quiet Title Act, 28 U.S.C. 2409a, must establish a property interest in the land.

3. Whether the present case was moot at the time of the proposed intervention or became moot as a result of a subsequent decision by the United States Forest Service to open the land to motorized traffic.

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In the Supreme Court of the United States

No. 08-571

ELKO COUNTY, NEVADA, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 526 F.3d 1237. The opinion of the district court (Pet. App. 15-46) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2008. Petitions for rehearing were denied on August 1, 2008 (Pet. App. 80-81) and September 8, 2008. The petition for writ of certiorari was filed on October 28, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a dispute over the status of a road located in Elko County, Nevada. The South Jarbidge Canyon Road runs through the Humboldt-Toiyabe

National Forest, and alongside the West Fork of the Jarbidge River. It provides access to the Jarbidge Wilderness Area in northern Elko County. In the late 1990s, after flooding made the South Jarbidge Canyon Road impassable, a group of Elko County residents threatened to open the road themselves if local officials failed to act. Petitioner then authorized its County Road Department to restore the road. Pet. App. 18-19, 48-50.

In October 1999, the United States filed the present action to enjoin Elko County employees involved in the road reconstruction project from conducting any further work. The United States alleged not only that the county employees were trespassing on federal land, but also that their activities would adversely affect protected bull trout in the adjacent river, in violation of the Endangered Species Act of 1973, 16 U.S.C. 1538(a)(1)(G). The United States District Court for the District of Nevada granted the injunction, and joined petitioner as a defendant pursuant to Federal Rule of Civil Procedure 21. Petitioner then asserted a counterclaim under the Quiet Title Act, 28 U.S.C. 2409a, contending that it possessed a valid right-of-way over the road pursuant to federal law. Pet. App. 4, 25, 50-51.

2. In March 2001, the parties reached a settlement. The United States agreed not to contest petitioner's right-of-way, and petitioner agreed not to perform any work on the road without obtaining authorization from the United States Forest Service (Forest Service) and complying with federal environmental laws. At that point, respondents The Wilderness Society and the Great Old Broads for Wilderness (collectively, TWS) moved to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2). TWS claimed that ceding a right-of-way to petitioner would adversely af-

fect its members' use and enjoyment of the nearby wilderness area—an interest that, according to TWS, was not adequately represented by the local and federal governments. The district court denied the motion to intervene as untimely. TWS appealed, and the court of appeals reversed. Pet. App. 71-77; see *id.* at 58-61.

On remand, TWS renewed its motion to intervene. It also filed cross-claims against the United States pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 702, challenging the terms of the settlement as violative of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332; the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*; and Forest Service regulations, 36 C.F.R. Pt. 251. Pet. App. 5-6.

3. a. The district court found that TWS had standing to intervene as a plaintiff and bring its cross-claims against the United States, but not to defend against petitioner's counter-claim under the Quiet Title Act. Pet. App. 47-70. TWS had standing to bring its cross-claims because the "members of TWS have suffered harm to their recreational and aesthetic enjoyment of the Jarbidge Wilderness," *id.* at 59-60, and "[e]cological and aesthetic injuries resulting from road building activities on the South Canyon Road * * * are within the zone of interests of statutes designed to ensure that certain procedures are followed in the management of public lands," *id.* at 60-61. However, because TWS had "no property interest in the South Canyon Road," *id.* at 62, it had not suffered an injury in fact from petitioner's right-of-way, *id.* at 61-62, and also was not among "those alleging property rights contested by the United States," who are protected by the Quiet Title Act, *id.* at 62.

Although the court found that TWS had standing to litigate its cross-claims, it then dismissed those claims as not reviewable under the APA. Pet. App. 62-65. "[B]ecause the settlement agreement entered into by the Department of Justice was not an 'agency action,'" the court reasoned, "judicial review under the APA is not available." *Id.* at 64 (quoting 5 U.S.C. 704). Yet the court nevertheless stayed the settlement agreement. *Id.* at 66-69. According to the court, the United States' disclaimer of any property interest in the road "equate[d] to the issuance of a right-of-way, which triggers the requirement that the government comply with FLPMA, NEPA, and Forest Service regulations." *Id.* at 68. The court thus "no longer [found] the settlement to be fundamentally fair to the public interest," *ibid.*, and stayed the settlement "pending compliance by the Forest Service with these laws," *id.* at 69.

b. After an evidentiary hearing involving petitioner and the United States, the district court approved the settlement. Pet. App. 15-46. It found that the United States had not granted petitioner a property interest in the land, but only had agreed to forbear claiming trespass in the future if petitioner complied with federal environmental laws. *Id.* at 25-26, 30. Thus, the court's previous decision "was based upon insufficient evidence, which has since been rectified." *Id.* at 46. Moreover, "[t]he Government has now completed all environmental studies that these governing statutes require." *Ibid.* The court therefore concluded "that the Settlement Agreement is fair, adequate and reasonable, and conforms to all applicable law." *Ibid.*

4. The court of appeals reversed. Pet. App. 1-14. It held that "[its] prior opinion foreclosed any argument" that TWS "[was] not entitled to intervene" in the

Quiet Title Act action. *Id.* at 8. "Because the intervenors were not permitted to participate in the settlement review proceedings," *id.* at 9, the court vacated the settlement. It rejected the government's argument that the Attorney General's decision to settle the case was committed to his discretion by law and thus unreviewable under the APA, 5 U.S.C. 701(a)(2). Pet. App. 10-12. Finally, the court recognized that TWS had filed "an independent action in district court to challenge the Forest Service's decision to open a road to vehicular traffic" and that "construction of the road has begun," but the court "express[ed] no opinion on the merits of this independent action or whether, on remand, any party may successfully contend that the matter has become moot." *Id.* at 13.

ARGUMENT

Petitioner contends that this Court should grant certiorari to determine (1) whether an intervenor as of right pursuant to Federal Rule of Civil Procedure 24 must establish independent standing (Pet. i, 9-13); (2) whether an intervenor as of right in a federal quiet-title action must establish a property interest in the land (Pet. 14-21); and (3) whether this case was moot when TWS moved to intervene or else has become moot as a result of subsequent developments (Pet. 21-24). The first claim is not presented by this case; the second claim is neither clearly presented, nor the subject of any split of authority, nor ripe for review; and the third claim is best addressed by the lower courts in the first instance. None of these claims presently merits further review.

1. Petitioner lists, as a separate question presented, whether a proposed intervenor of right is "required to have independent Article III and prudential standing."

Pet. i. Petitioner also discusses a putative split among the courts of appeals over "whether Article III standing is necessary to support intervention in the district courts in every case." Pet. 9; see Pet. 10 ("The Ninth Circuit's position on the necessity of establishing independent Article III standing to support intervention of right * * * is ambiguous.").

But that question is not presented by this case. The court of appeals did not conclude that TWS could intervene even if it lacked Article III standing. Rather, the court concluded that TWS *had* Article III standing. According to the court, "the intervenors were entitled to intervene because they had the requisite interest in seeing that the wilderness area be preserved for the use and enjoyment of their members." Pet. App. 8. That interest, the court concluded, "was sufficient to allow them to intervene under Federal Rule of Civil Procedure 24(a) *and to satisfy any requirements of Article III standing.*" *Ibid.* (emphasis added); see Pet. 14 ("The Ninth Circuit panel in May, 2008, held that if TWS needed Article III standing to intervene, it had it by virtue of its interest in the environment.").

2. Petitioner takes issue with whether TWS's environmental interest actually did suffice for standing. It asserts, as its second question presented, that TWS's environmental interest is "[not] sufficient to confer Article III and prudential standing on a proposed intervenor in a Quiet Title action under 28 U.S.C. [2409a]." Pet. i. According to petitioner, an intervenor in a quiet title action must assert "a claim of ownership to the real property in issue," Pet. 7, and not merely "a significant protectable interest in the subject matter of the law suit," Pet. 8. Otherwise, intervenors will be able "to challenge or promote general federal policy before the court in quiet title

actions." *Ibid.* While petitioner is correct that TWS should not have been permitted to intervene in this case, TWS is incorrect that the question presently merits the Court's attention for three reasons.

First, petitioner's claim is not clearly presented by this case. Although the district court did not permit TWS to intervene as a defendant in petitioner's quiet-title counterclaim, it *did* permit TWS to intervene as a plaintiff in order to bring cross-claims against the United States under the APA. Pet. App. 57. Petitioner did not cross-appeal that portion of the district court's judgment, which did not matter at the time because the court separately dismissed the counterclaims as unreviewable under the APA. *Id.* at 64-65. The court of appeals, however, held that the cross-claims were reviewable, *id.* at 12, and petitioner does not challenge that portion of the decision below before this Court. The net effect is that TWS can participate in the litigation. Whether it participates as a plaintiff or a defendant, it advances the same arguments and seeks the same relief: it wants the settlement agreement vacated on the ground that the United States failed to comply with applicable environmental laws in entering into the settlement. See TWS C.A. Br. 23 n.12. And the court of appeals made clear that TWS's status as an intervenor does not give it the right to veto a settlement. Pet. App. 8a-9a.

Second, even assuming the question were presented, petitioner's claim is not as yet the subject of any split of authority. Petitioner points to only one decision from another court of appeals to consider the question, *San Juan County* v. *United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc), and in that quiet-title action a majority of the en banc court concluded that an environmental group without a claim of ownership to the property at issue nevertheless had an interest "relating to" the action for purposes of Federal Rule of Civil Procedure 24(a)(2). *San Juan County*, 503 F.3d at 1200-1201.

Third, any review of the court of appeals' decision would be premature because that decision is interlocutory. Issues remain on remand concerning the nature of objections TWS would be permitted to raise and the degree to which those objections would furnish a basis for the court to disapprove the settlement between the principal parties. If petitioner and the United States are ultimately successful in obtaining judicial approval of the settlement agreement, the claim that petitioner raises in its petition will be moot. On the other hand, if the settlement agreement is not approved, petitioner will be able to raise the instant claim—together with any other claims it might have—in a petition for a writ of certiorari seeking review of the judgment rejecting the agreement. Accordingly, petitioner's case is not ripe for review at this time.

3. Petitioner asserts (Pet. 21-24) that this Court should determine whether this case was moot when TWS moved to intervene, or in the alternative became moot when the Forest Service opened South Jarbidge Canyon Road to motorized traffic. Petitioner's former assertion is incorrect. TWS moved to intervene before the district court had approved the settlement agreement, at which point the question of whether that agreement complied with applicable federal laws was not moot. Accordingly, it is irrelevant whether "one seeking to intervene in an otherwise moot case in which all parties have settled all issues, must have standing," Pet. 21, because the case was not otherwise moot at the time that TWS sought to intervene.

Petitioner's latter assertion was expressly not decided by the court of appeals, see Pet. 24, and it cites nothing for the proposition that the court of appeals was required to address mootness rather than remand to the district court for factual findings. In any event, for purposes of this Court's review, an analysis of mootness is best left to the district court on remand. This Court has repeatedly stated that it ordinarily does not "decide in the first instance issues not decided below." *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); see *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). There is no reason to depart from that ordinary practice here, in order to determine a factbound question of mootness in the absence of appropriate factual findings from the lower courts. Nevertheless, because there is a very real possibility that the case is moot, that is itself a reason counseling against this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
WILLIAM B. LAZARUS
ELIZABETH A. PETERSON
Attorneys

FEBRUARY 2009

Supreme Court, U.S.
MOTION FILED

DEC - 1 2008

William K. Suter,
Clerk

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No. 08-571

In The
Supreme Court of the United States

◆

ELKO COUNTY, NEVADA,

Petitioner,

v.

THE WILDERNESS SOCIETY; GREAT OLD BROADS FOR WILDERNESS; UNITED STATES OF AMERICA; AND JOHN C. CARPENTER, INDIVIDUALLY AND AS AGENT FOR CITIZENS UNITED FOR THE SOUTH CANYON ROAD,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

STEVEN J. LECHNER
Counsel of Record
WILLIAM PERRY PENDLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2(b), Mountain States Legal Foundation ("MSLF") respectfully requests leave of this Court to file the accompanying amicus curiae brief, in support of Petitioner. Petitioner, Respondent, United States of America, and Respondent, John C. Carpenter, granted consent to MSLF to file an amicus curiae brief. Respondents, The Wilderness Society and Great Old Broads for Wilderness, however, withheld consent.

As demonstrated in the Identity and Interest section of the accompanying amicus curiae brief, MSLF may be adversely affected by the Ninth Circuit's decision in the instant case and believes that its amicus curiae brief will bring relevant matters to this Court's attention. As a result, MSLF respectfully requests that its Motion for Leave to File Amicus Curiae Brief be granted.

DATED this 1st day of December 2008.

Respectfully submitted by:

STEVEN J. LECHNER
Counsel of Record
William Perry Pendley
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

QUESTION PRESENTED

The Quiet Title Act ("QTA"), 28 U.S.C. § 2409(a), operates as a limited waiver of the United States' sovereign immunity so that parties may resolve disputes regarding title to interests in real property against the United States. *Block v. North Dakota*, 461 U.S. 273, 280-87 (1983). The question presented is:

Do environmental groups, which assert no ownership interest in the disputed real property, have "an interest relating to the property . . . that is the subject of the action" so as to entitle them to intervene as of right in a QTA case?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.

◆

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

MSLF is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has over 5,000 members throughout the United States. The majority of these members own property, and/or do business in the western United States. A significant portion of these members are direct descendants of, or successors-in-interest to, the original settlers, miners, railroads, farmers, and/or irrigators who acquired real property interests under the numerous land grant and/or right-of-way statutes that were passed in the late 1800s and early 1900s. *See, e.g.*, the Homestead Act of 1862, 12 Stat. 392-93 (43 U.S.C. § 161 *et seq.*) (repealed 1976); Section 9 of the Mining Act of 1866, 14 Stat. 251, 253 (43 U.S.C. § 661) (repealed 1976) (granting the right-of-way for ditches and canals); the General Mining Law of 1872, 30 U.S.C. § 21 *et seq.*; the General Railroad Right of Way Act of 1875, 18 Stat. 482-83 (43 U.S.C. §§ 934-939) (repealed 1976); the General Right of Way Act of 1891, 26 Stat. 1101-02. (43 U.S.C. §§ 946-949) (repealed 1976); the Stock-Raising Homestead Act of 1916, 39 Stat. 862 (43 U.S.C. §§ 291-302) (repealed 1976).[2]

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[1] Pursuant to Supreme Court Rule 37, letters advising of MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date hereof. Pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored the accompanying amicus curiae brief in whole or in part and that no party, person, or entity, other than MSLF, its members, and its counsel, made a monetary contribution for the preparation or submission of this brief.

Because of these land grant and right-of-way statutes and the federal government's change in philosophy from land disposal to land retention, *see Lujan v. National Wildlife Federation*, 497 U.S. 871, 875-77 (1990), private and federal real property interests have become intermingled throughout the western United States. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (describing checkerboard land pattern created by the Union Pacific Act of 1862); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) (describing private surface and federal mineral estates created by the Stock-Raising Homestead Act); *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865 (1999) (holding that Congress did not reserve coalbed methane when it reserved the coal in lands patented under Coal Lands Acts of 1909 and 1910). Because of these intermingled real property interests, MSLF has represented clients in Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, cases against the United States. For example, MSLF has represented inholders seeking to quiet title to an easement across federal lands in order to access their lands patented under the various homestead acts. *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994), *on appeal after remand*, 129 F.3d 1348 (10th Cir. 1997); *Fitzgerald Living Trust v. United States*, 460 F.3d 1259 (9th Cir. 2006); *McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005), *on appeal after remand, McFarland v. Kempthorne*, ___ F.3d ___ (9th Cir. 2008), 2008 WL 4426628.

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[2] Although the Sections 702 and 706(a) of Federal Land Policy and Management Act of 1976 ("FLPMA"), 90 Stat. 2787-89, 2793-94, repealed most of these land grant and right-of-way statutes, Section 701 of FLPMA expressly preserved all "valid existing rights" and rights-of-way. 90 Stat. 2786.

MSLF has also represented clients in QTA cases seeking to quiet title to rights-of-way under Section 8 of the Mining Act of 1866, 14 Stat. 251, 253 (43 U.S.C. § 932) (repealed 1976). *Millard County, Utah v. United States*, No. 93-C-591J (D. Utah); *United States v. Boundary County, Idaho*, No. 98-0253-N-EJL (D. Idaho). This statute, which is at issue in the instant case and is commonly referred to as "R.S. 2477," provided: "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." 14 Stat. at 253. This statutory grant played an important role in the development of the western United States. *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 740 (10th Cir. 2005) (noting that "most of the transportation routes of the West were established under [R.S. 2477]"). Moreover, because the grant in R.S. 2477 could be accepted without any action on part of the federal government, there has been significant controversy over the last thirty years regarding the existence of such rights-of-ways. *See* Note, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. Ann. Surv. Am. L. 547, 556-60 (2008). As a result, more QTA litigation involving R.S. 2477 rights-of-way will occur in the years to come. *See* U.S. Department of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Claims on Federal and Other Lands* 29 (1993) (noting that there were approximately 5,600 R.S. 2477 claims pending with the Bureau of Land Management).

In the instant case, the Ninth Circuit ruled that environmental groups, which asserted no ownership interest in the disputed real property, were entitled to intervene as of right in a QTA case. If the Ninth Circuit's decision is allowed to stand, it will seriously impact MSLF, its members, and future clients, as well as the United States. In fact, nothing could be better calculated to frustrate QTA litigation than the rule adopted by Ninth Circuit. Indeed, allowing environmental groups, which assert no ownership interest, into QTA litigation will drastically increase litigation expenses and delay the resolution of what is a private dispute. In short, the Ninth Circuit's decision will turn QTA cases into public forums for debating federal land management policies.

◆

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT FEDERAL QUESTION REGARDING WHO IS ENTITLED TO INTERVENE AS OF RIGHT IN A QTA CASE.

A. An Applicant For Intervention Of Right Must Demonstrate A "Legally Protected Interest."

Rule 24(a) of the Federal Rules of Civil Procedure provides, in relevant part:

> **Intervention of Right**. On a timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Thus, under Rule 24(a)(2), an applicant is entitled to intervene as of right when four requirements are satisfied: (1) a motion to intervene is timely filed; (2) the applicant claims an "interest relating to the property or transaction that is the subject of the action;" (3) the applicant "is so situated that disposing of the action may as a practical matter impair or impede the [applicant's] ability to protect its interest;" and (4) that "interest" is not "adequately represent[ed]" by existing parties. Since the 1966 Amendments to Federal Rules of Civil Procedure, Rule 24(a)(2) has remained substantially unchanged. 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 1908.1 (2008) ("Wright & Miller"). During this time, this Court has, on two occasions, specifically addressed the second requirement for intervention as of right.

In the first case, *Cascade Natural Gas Corp. v. El Paso Natural Gas Company*, 386 U.S. 129, 131-36 (1971), this Court allowed three applicants to intervene in a government antitrust case. The case was complicated because the motions to intervene were not filed until after it became apparent that this Court's earlier mandate was not being followed. *Id.* at 935-36; *see United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964) (ordering El Paso to divest of Pacific Northwest Pipeline Corporation). To further complicate matters, by the time the case had reached this Court, Rule 24 had been amended in 1966.[3] *Cascade*, 386 U.S. at 935. Over a strong dissent, the majority of this Court granted intervention to two of the applicants under the old Rule 24 and granted intervention to the third under the new Rule 24.[4] *Id.* at 935-37. Because of these complicating factors, the lower courts, commentators, and legal scholars have not regarded the majority's decision in *Cascade* as significant precedent regarding the requisite "interest" for intervention as of right under Rule 24(a)(2). *United States v. Automobile Manufacturers Ass'n*, 307 F.Supp. 617, 619 n.3 (C.D. Cal. 1969), *appeal dismissed, New York v. United States*, 397 U.S. 248 (1970) (suggesting that the ruling in *Cascade* is "*sui generis* and must be limited to the facts of that case"); Wright & Miller, *supra*, § 1908.1 ("[T]he Court's desire to see that its mandate be obeyed provided strong pressure for a liberal reading of the intervention requirements."); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721, 729-30, 741-42 (1968) (same).

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[3] Former Rule 24 had been interpreted as requiring applicants to show that they would be "bound" in a *res judicata* sense by the resulting judgment in the pending case to be entitled to intervene as of right. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689-93 (1961). The 1966 amendments to Rule 24 were intended to, *inter alia*, alleviate the harshness of that ruling. Fed. R. Civ. P. 24, 1966 Advisory Committee Note.

[4] In dissent, Justice Stewart, joined by Justice Harlan criticized the majority opinion because it "repudiate[d] a large and long-established body of decisions specifically, and correctly, denying intervention in government antitrust litigation." *Id.* at 147 (Stewart, J., dissenting). Instead, Justice Stewart would have ruled that none of the applicants were entitled to intervene under either the old or new Rule 24 because they lacked a "sufficiently direct and immediate" interest to intervene in federal antitrust litigation. *Id.* at 153-54 (Stewart, J., dissenting).

The second case is *Donaldson v. United States*, 400 U.S. 517 (1971). In that case, the IRS, which was investigating a taxpayer's federal tax returns, served summonses on a former employer of the taxpayer and an accountant for the employer, demanding that they produce certain records regarding the taxpayer. *Id.* at 518-19. The taxpayer first obtained a federal court injunction restraining the employer and the accountant from complying with the summonses without a court order. *Id.* at 519-20. The United States then filed petitions with the same court to enforce compliance with the summonses. *Id.* at 520. The taxpayer then moved to intervene in those enforcement proceedings. *Id.* at 521. After the district court's denial of the taxpayer's motion was upheld on appeal, *id.* at 521-22, this Court granted certiorari because of the confusion regarding the right to intervene in such enforcement proceedings. *Id.* at 522.

After determining that the Federal Rules of Civil Procedure were applicable to such enforcement proceedings, *id.* at 528-29, this Court rejected that taxpayer's argument that he was entitled to intervene as of right. *Id.* at 530-31. Specifically, this Court ruled that the records were the employer's routine business records, in which the taxpayer had "no proprietary interest of any kind" or any claim of work-product or privilege. *Id.* at 530. Instead, because the employer and the accountant were willing to produce the records, this Court ruled that the taxpayer's asserted interest was nothing more than a "desire" to overcome that willingness. *Id.* at 531. This Court then ruled that this "desire:"

> [C]annot be the kind [of interest] contemplated by Rule 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a *significantly protectable interest.*

Id. at 531 (emphasis added).

It was probably no accident that the term "significantly protectable interest" in *Donaldson* is very similar to the "legally protectable interest" term that this Court has employed in its standing analysis. *See Gange Lumber Co. v. Rowley*, 326 U.S. 295, 307-08 (1945) ("In our view appellant has not made the showing of substantial harm, actual or impending, to any *legally protected interest* which is necessary to call in question the statute's validity.") (emphasis added). It follows then that "significantly protectable interest" means more than just a general or abstract interest in the ongoing litigation. *See Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring) (abstract or speculative interests do not satisfy *Donaldson*'s "significantly protectable interest" requirement). Instead, "significantly protectable interest" must mean the "legally protected interest," which the "actual and imminent invasion of" will satisfy the "injury" requirement for Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted). Such a conclusion is in accordance with this Court's admonition that federal courts are not forums for airing generalized grievances. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (noting that this Court has refrained from adjudicating "abstract questions of wide public significance" that amount to generalized grievances shared by a large number of citizens).

B. An Applicant's "Legally Protected Interest" Must "Relate To" The Claim For Relief At Issue.

It is well established that the Federal Rules of Civil Procedure are construed in accordance with their "plain meaning." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). Rule 24(a)(2) requires that an applicant for intervention of right "claim[ ] an interest *relating to* the property or transaction that is the subject of the action[.]" Fed. R. Civ. P. 24(a)(2) (emphasis added). The plain meaning of "relate" is "to show or establish logical or causal connection between." *Merriam-Webster's Collegiate Dictionary* 1051 (11th ed. 2003). Thus, based upon the plain language of Rule 24(a)(2), there must be a "logical or causal connection between" the applicant's "legally protected interest" and the claim for relief at issue. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995) ("In ascertaining a potential intervenor's interest in a case, our cases focus on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues."); *Sierra Club v. EPA,* 995 F.2d 1478, 1484 (9th Cir. 1993) (there must be "a relationship between the legally protected interest and the claims at issue"). As a result, the particular claim for relief at issue must be considered when reviewing an application for intervention of right. *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2nd Cir. 1984) ("The requirements for intervention embodied in Rule 24(a)(2) must be read . . . in the context of the particular statutory scheme that is the basis for the litigation. . . .").

C. Only Those Who Assert An Ownership Interest In The Disputed Real Property Have A "Legally Protected Interest" "Relating To The Property" In A QTA Case.

The sole purpose of a QTA case is "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). In fact, the QTA is the exclusive means by which to challenge the United States' title to real property. *North Dakota,* 461 U.S. at 286. Thus, a person seeking to quiet title to real property against the United States must set forth, with particularity, the nature of the claimed interest in the real property, the circumstances under which it was acquired, and the right title and interest of the United States. 28 U.S.C.

§ 2409a(d). In short, a QTA case is "an *in personam* proceeding . . . the purpose of *which is to determine which named party has superior claim* to a certain piece of property." *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993) (citing *Nevada v. United States*, 463 U.S. 110, 143-44 (1983)) (second emphasis added). Moreover, if the final judgment is adverse to the United States, it may elect to keep all or part of the prevailing party's real property upon the payment of "just compensation."[5] 28 U.S.C. § 2409a(b).

Because of the limited nature of a QTA case, third parties who assert no ownership interest have no right to intervene in such a case. *Cf. Alaska v. United States*, 534 U.S. 1103 (2002) (approving Report of Special Master denying intervention in an original QTA case by individuals who lacked interest in disputed real property); *Arizona v. California*, 530 U.S. 392, 419 n.6 (2000) (refusing to consider objections by an association that was denied intervention because its members lacked any interest in the land or water at issue); *Utah v. United States*, 394 U.S. 89, 92-93 (1969) (in an original action, this Court recognized that a purported property owner would have been entitled to intervene in a title dispute but for the fact the original parties had resolved their differences regarding his property); *Smith v. Gale*, 144 U.S. 509, 518 (1892) (to intervene in a private quiet title suit an applicant must claim an interest in, or lien on, the property at issue) (citing *Horn v. Volcano Water Co.*, 13 Cal. 62, 70 (1859) (Stephen J. Field, J.)). This conclusion is in accordance with the well established rule that only persons who claim an ownership interest in the disputed real property may bring or defend a QTA case. *Long v. Area Manager*, 236 F.3d 910, 915 (8th Cir. 2001) (No one can assert a QTA claim who "does not claim a property interest to which title may be quieted."); *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978) (members of the public do not have the requisite "interest" in a purported public road to bring a QTA case against the United States).

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[5] Conversely, "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by [28 U.S.C. § 1346(f)]." 28 U.S.C. § 2409a(e).

This conclusion is further supported by the principle that a third party may not conduct QTA litigation on behalf of the United States. Indeed, Congress has delegated that authority exclusively to the U.S. Department of Justice under the direction of the Attorney General. 28 U.S.C. § 516; *see Utah*, *supra*, 394 U.S. at 94-5 (Solicitor General has "broad authority" to conduct litigation involving ownership of property on behalf of the United States before this Court); *Carlson v. United States*, 556 F.2d 489, 493 (Ct. Cl. 1977) (a third party has "no authority to claim land on behalf of the United States"); *Leisnoi, Inc. v. United States*, 313 F.3d 1181, 1185 (9th Cir. 2002) (the decision to disclaim all interest in the property at issue in the QTA is "entirely the prerogative of the United States"); *cf. St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636, 640-41 (1881) (it "does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it").

Finally, this conclusion is also supported by Rule 19 of the Federal Rules of Civil Procedure. This Rule addresses the required joinder of an absent person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may" "as a practical matter impair or impede the person's ability to protect the interest[.]" Fed. R. Civ. P. 19(a)(1)(B)(i). The similarity of this language and that found in Rule 24(a)(2) is no mistake. Indeed, one purpose of the 1966 amendments to the Federal Rules of Civil Procedure was to "tie more closely together the related situations" of joinder and intervention. *Atlantis Development Corp. v. United States*, 379 F.2d 818, 823-24 (5th Cir. 1967). Thus, under the 1966 amendments, a person whose "position is comparable to that of a person under Rule [19]" is entitled to intervene as of right, "unless that [person's] interest is already adequately represented in the action by existing parties." Fed. R. Civ. P. 24, 1966 Advisory Committee Note; *Atlantis Development Corp.*, 379 F.2d at 825 ("the question of whether an intervention as a matter of right exists often turns on the unstated question of whether joinder of the intervenor was called for under new Rule 19"); Benjamin Kaplan, *Continuing Work of the Civil*

Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 405 (1967) ("[T]he interest spoken of in new rule [24] finds its own limits in the historic continuity of the subject of intervention and in the concepts on new rule 19, to which intervention looks for analogy."). It strains credulity to think Rule 19(a)(1)(B)(i) would ever be used to require the joinder in a QTA case of a person who did not assert an ownership interest in the real property. It follows then, that such a person is not entitled to intervene as of right in a QTA case.

Applying the foregoing principles and precedents to the instant case compels the conclusion that the Ninth Circuit erred when it ruled that the environmental groups had the requisite "interest" to intervene as of right. Petitioner's Appendix ("Pet. App.") 8. It was undisputed that the environmental groups lack a property interest in the R.S. 2477 or the land burdened thereby. Pet. App. 7 ("Everyone agrees that . . . the [environmental groups] . . . have no property interest."). Instead, the environmental groups asserted merely an "interest in seeing that the wilderness areas be preserved for use and enjoyment of their members." Pet. App. at 8. In other words, the environmental groups asserted a general interest in the management of the federal lands surrounding the R.S. 2477. That this interest is not sufficient to intervene in a QTA case is clear. Indeed, just as the taxpayer in *Donaldson* could not intervene despite his non-trivial interest in preventing the disclosure of his former employer's records, environmental groups, which assert no ownership interest in the disputed real property, are not entitled to intervene in QTA cases because they lack the necessary interest.

II. THIS COURT SHOULD GRANT REVIEW TO PREVENT ENVIRONMENTAL GROUPS FROM TURNING FEDERAL COURTS INTO PUBLIC FORUMS FOR DEBATING FEDERAL LAND MANAGEMENT POLICIES.

In ruling in favor of environmental groups, the Ninth Circuit erroneously relied on the Tenth Circuit's heavily fragmented decision in *San Juan County, Utah v. United States*, 503 F.3d 1163 (10th Cir. 2007) (en banc). Pet. App. 8. In that case, seven of the thirteen judges sitting en banc ruled that environmental groups had a sufficient interest to intervene in a QTA case involving an R.S. 2477 because of their purported interest in the use of the area for "conservation, aesthetic, scientific and recreational purposes."[6] *San Juan County*, 503 F.3d at

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[6] Three judges from the majority opinion ruled that the environmental groups' interest was adequately represented by the United States. *San Juan County*, 503 F.3d at 1203-07. The six concurring judges would have ruled that the environmental groups lacked a legally protectable interest relating to property at issue because the environmental groups' concern about the "use" of the surrounding land had no relationship to the issue in the case, *i.e.*, "ownership" of the right-of-way. *Id.* at 1208 (concurring opinion). Based upon these nine votes, the en banc court affirmed the district court's denial of intervention. *Id.* at 1207.

1199-1203. In so doing, the majority opinion essentially limited this Court's ruling in *Donaldson* to the facts in that case. *Id.* at 1191-92. This allowed the majority opinion to conclude that the environmental groups' "concern" about the area surrounding the right-of-way was a sufficient interest for intervention of right. *Id.*. at 1199. If the taxpayer's "desire" in *Donaldson* to prevent the disclosure of his employment records, which could result in civil or criminal penalties, was not a "significantly protectable interest," *a fortiori*, an abstract "concern" about the environment is not "significantly protectable interests" in a QTA case.

To make matters worse, the majority opinion read out of Rule 24(a)(2) the requirement that the asserted "interest" "relat[e] to the property . . . that is the subject of the action[.]" Fed. R. Civ. P. 24(a)(2). Instead, the majority opinion adopted a purportedly "pragmatic" test that merely looks to the "practical effect" the litigation may have on an applicant's interest.[7] *San Juan County*, 503 F.3d at 1199-2000. This "test," however, violates this Court's admonition that courts are to "apply the text [of a Rule.]" *Pavelic & LeFlore*, 493 U.S. at 126; *cf. United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not destroy. [Thus, it] is our duty to give effect, if possible, to every clause and word of a statute. . . .") (internal quotations and citations omitted).

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[7] The concurring opinion criticized the majority's "pragmatic" test because the "practical effect" of having unnecessary parties in QTA cases was increased litigation costs for the real parties in interest. *San Juan County*, 503 F.3d at 1209.

More seriously, the majority opinion's purportedly "pragmatic" test, which was implicitly adopted by the Ninth Circuit in the instant case, knows no bounds because the situations in which a case may have some "practical effect" on an abstract environmental "concern" are almost limitless. Thus, environmental groups now have an open invitation to move to intervene and voice their abstract "concerns" in QTA cases across the country. To say that such an open invitation defeats the purpose of the Federal Rules of Civil Procedure, which is to secure the "just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, is an understatement. Indeed, as explained by the concurring opinion in *San Juan County*:

> An intervenor in a quiet title action seeking to maintain the land's current use has every incentive to use its participation to postpone a final decision on the merits, thereby prolonging its use at the expense of the parties' need to have a final adjudication of the title.

503 F.3d at 1210 (concurring opinion).[8]

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[8] The concurring opinion could have been referring to the situation in the instant case. Petitioner and the United States resolved their differences regarding the disputed right-of-way in 2001. Pet. App. 4. Seven years later, they are being held hostage

(Continued on following page)

In short, the Ninth Circuit's decision in the instant case has turned federal courts into public forums for debating federal land management policy. Federal courts, however, are not the place to debate policy. *Cf.*, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (Standing ensures that "legal questions . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."); *United States v. Richardson*, 418 U.S. 166, 174 (1974) (A taxpayer may not use "'a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.'") (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)); *Warth*, 422 U.S. at 499-500 (noting that under the separation of powers doctrine "generalized grievances" need to be aired before the other branches of government). Indeed, as the Court of Federal Claims explained twelve years ago in denying intervention to environmental groups in an inverse condemnation action:

> The courts have never been a proper place to debate public policy, though this may appeal

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in a QTA case by environmental groups that have no ownership interest in the real property. Because the Ninth Circuit vacated the approved settlement agreement, Pet. App. 9, and remanded with instructions for the district court to consider the purported objections of the environmental groups, Pet. App. 13-14, Petitioner and the United States may be held hostage for another seven years.

> to the judicial ego. Once judges start setting public policy they cease to be the least dangerous branch.

Hage v. United States, 35 Fed. Cl. 737, 741 (Fed. Cl. 1996).

Taken to its extreme, however, the rationale of the Ninth Circuit's decision may now be used by environmental groups to intervene in inverse condemnation cases, as well as eminent domain proceedings. Therefore this Court should grant review to prevent environmental groups from turning federal courts into public forums for debating federal land management policies.

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CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted by:

STEVEN J. LECHNER
Counsel of Record
WILLIAM PERRY PENDLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

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